TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 87.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, AND EDWIN W. HAYS, PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 16, 1907.

(20,347.)

(20,347.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 382.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, AND EDWIN W. HAYS, PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1907.

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1 Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, in Frankfort, on the 12th day of June, A. D. 1906.

BANK OF KENTUCKY, &c., Appellants,
vs.
COMMONWEALTH OF KY., by, &c., Appellees.

Appeal from Jefferson Circuit Court, Chy. (1st) Div.

Be it remembered, That on the 29th day of April, 1904, the appellants, by their attorneys, filed in the office of the Clerk of the Court of Appeals a transcript of record, and which is in words and figures as follows, viz:

#36209.

STATE OF KENTUCKY, *County of Jefferson:*

Pleas before his Honor Shackelford Miller, Judge of the Jefferson Circuit Court, Chancery Branch, First Division, at the Court House, in the City of Louisville, County and State aforenamed, and on dates herein after mentioned.

2 COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Plaintiff,
vs.
BANK OF KENTUCKY and NATIONAL BANK OF KENTUCKY, Defendants.

Transcript of Record.

Be it remembered that heretofore, to-wit, on the 8th day of January, 1904, came the appellants, Bank of Kentucky and National Bank of Kentucky, by counsel, and filed herein a transcript of the record and proceedings from the County Court of Jefferson County. Said transcript is in words and figures as follows, to-wit:

STATE OF KENTUCKY, *County of Jefferson:*

Pleas before Honorable James P. Gregory, Judge of the Jefferson County Court, at the Court House, in the City of Louisville, County and State aforesaid, and on the dates herein after mentioned.

3 COMMONWEALTH OF KENTUCKY, &c., Plaintiff,

vs.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, President, and E. W. HAYS, Cashier, of said Banks, Defendants.

STATE OF KENTUCKY, *Jefferson County:*

January County Court, January 13, 1903.

THE COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent for the State at Large,

vs.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, President, and E. W. HAYS, Cashier, of said Banks.

4 Came plaintiff, by counsel, and filed statement of omitted property to be listed for assessment for county and state purposes for the years and the amounts therein set out.

The statement referred to in the foregoing order is as follows:

Jefferson County Court.

THE COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent for the State at Large, Plaintiff,

vs.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, President, and E. W. HAYS, Cashier, of said Banks, Defendants.

Statement.

The plaintiff, Commonwealth of Kentucky, by T. C. Albritton, who has been duly appointed, qualified, and is now acting as revenue agent for the State at large, as provided by law, states that the defendant, Bank of Kentucky, was on and for many years prior to September 15, 1898, a corporation chartered and existing
5 under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to carry on the business of banking in the City of Louisville, County of Jefferson, State of Kentucky, and was then engaged in said business in the City, County and State aforesaid, and continued to carry on the banking business therein until on or about May 1, 1900; that on September 15, 1898, and September 15, 1899, respectively, and thereafter until on or about May 1, 1900, the defendant, Oscar Fenley, was President, and the defendant E. W. Hays was Cashier of the defendant Bank of Kentucky.

The plaintiff states that the amount of the capital stock of the defendant Bank of Kentucky, on September 15, 1898, and on September 15, 1899, respectively, and during the period from the latter date until on or about May 1, 1900, was $1,645,100.00 and the amount of its surplus on the same dates, and during the same period, was at least $1,102,928.90, and the total value of the capital stock and surplus of the defendant, Bank of Kentucky, on September 15, 1898 and on September 15, 1898 respectively and thereafter until on or about May 1, 1900, was at least $2,748,028.90, which was subject to assessment and taxation by the County of Jefferson
6 for the year beginning September 15, 1898 and ending September 14, 1899: and the year beginning September 15, 1899 and ending September 14, 1900; and to the State taxation for the year beginning September 15, 1899, and ending September 14, 1900.

The plaintiff states that the rate of taxation for sundry county purposes, levied by the fiscal court of Jefferson County for the year beginning September 15, 1898, and ending September 14, 1899, was seventeen cents (17) on each one hundred dollars ($100.00) of the value of all property subject to taxes for such purposes, assessed or liable to assessment, as of September 15, 1898, or for said year; at the rate of taxation for sundry County purposes, levied by said fiscal court, for the year beginning September 15, 1899, and ending September 14, 1900, was fifteen (15) cents on each one hundred dollars ($100.00) of the value of all property subject to taxation for such purposes, assessed or liable to assessment as of September 15, 1899, or for said year.

The plaintiff states that the rate of taxes fixed by law for state purposes for the year beginning September 15, 1899, and ending September 14, 1900, was forty-seven and one half (47½) cents
7 on each one hundred dollars ($100.00) of the value of all property subject to taxes for said purposes, assessed or liable to assessment as of September 15, 1899, or for said year.

The plaintiff states that the amount of taxes due and owing by the defendant Bank of Kentucky to the County of Jefferson *County*, on the value of its intangible property, or franchise, liable to and omitted from assessment for the year 1899, at the rate aforesaid, is $4671.64, and the amount thereof for the year 1900, at the rate aforesaid, is $4122.04; and the amount of the taxes due and owing by the defendant Bank of Kentucky on its capital stock and surplus, for the year 1900, at the rate aforesaid, is $13,053.13, no part of which taxes due and owing to the said county, or to the state, had been paid.

The plaintiff states that the defendant Bank of Kentucky and the defendants, Oscar Fenley and E. W. Hays, its President and Cashier respectively, failed and refused to list or report the property, capital stock, surplus, franchise, or intangible property, for County taxes for the two years aforesaid, or for State taxation for the years aforesaid; and said property of the defendant Bank of Kentucky
8 was omitted from assessment for taxation for County purposes for the years 1899 and 1900, as of September 15, 1898

and September 15, 1899, respectively; and the same was also omitted from assessment for taxation for State purposes for the year 1900, as of September 15, 1899, or as of any other date.

The plaintiff further states that the defendant Bank of Kentucky failed and refused to make the reports, or any report, as required by the revenue act of November 11, 1892 to the Auditor of Public Accounts, to be laid before and used by the Board of Valuation and Assessment, on or before March 1, 1899, and on or before March 1, 1900, respectively, up to and including December 31, 1898, and December 31, 1899, respectively, showing the facts required to be stated in such report by said Revenue Act, or Section 4078, Kentucky Statutes, to enable said Board to assess its franchise for taxation for the years 1899 and 1900 for County purposes; and said Board, for either of said years, made no assessment, but in each of said years omitted to make any assessment of the franchise of the defendant Bank of Kentucky for either State or County pur-
9 poses; and no part of the County taxes, due July 1, 1899 and July 1, 1900, respectively, on such franchise, by the Bank of Kentucky, for said years respectively, has been paid; and no part of the taxes due the State for the year 1900, on such franchise, on the capital stock and surplus of the defendant Bank of Kentucky has been paid.

The plaintiff states that the defendant Bank of Kentucky claims to be, and to have been entitled by law and the decisions of the State and Federal Courts to pay the State taxes at least only as required by the provisions of the Revenue Act of May 17, 1886, commonly called the Hewitt Act, that is to say at the rate of seventy-five (75) cents on each share of its capital stock, equal to one hundred ($100.00) dollars, and in addition, on so much of its surplus, undivided surplus undivided profits, or undivided accumulations, as exceed an amount equal to ten (10) per cent. of its capital stock, the same rate of taxation that was assessed upon real estate, which tax was, upon the verified report of its cashier, to the Auditor of Public Accounts, due and payable on the 1st day of July of each year.

The plaintiff states that under the provisions of said
10 Hewitt Act the defendant Bank of Kentucky owned, held and was liable to pay taxes to the State at the rate of seventy-five (75) cents on each one hundred dollars ($100.00) of its capital stock, amounting to $1,645,000.00, making $12,338.25; and on its surplus (less an amount equal to ten per cent. of its capital stock) $938,418.90, at 47½ cents on the $100.00, the rate then fixed by law, making $4,457.48, or the total State taxes for the year 1900, $16,795.73.

But plaintiff states that the defendant Bank of Kentucky failed and refused, by its President, Cashier, or other officer or agent, to make any such report to the Auditor, or to pay any part of State taxes as aforesaid, fixed and assessed by law as of September 15, 1899, for the year 1900, and made due and payable on July 1, 1900, under the provisions of the Hewitt Act.

The plaintiff further states that on or about May 1, 1900, the defendant Bank of Kentucky, upon a vote of its stockholders, re-organ-

ized under the provisions of the National Banking Act, and the laws of the State of Kentucky; and upon obtaining authority
11 from the Comptroller of the Currency to commence business as a national bank, under the name and style of the defendant, National Bank of Kentucky; and to the latter bank transferred and assigned all of its property and assets, tangible and intangible, which were at the time under and subject to the statutory lien held by the County of Jefferson for its said taxes and due it from the defendant, Bank of Kentucky, for the years 1899 and 1900; and held by the State for its said taxes due from the defendant, Bank of Kentucky, for the year 1900; and the defendant, National Bank of Kentucky, which, by said re-organization and compliance with the laws aforesaid, became and now is, a corporation organized and existing under the laws of the Congress of the United States and State of Kentucky, with power to sue and be sued, contract and be contracted with, and to carry on the business of a National Bank in said City, County and State, then took possession of said property and assets so under and subject to the liens of Jefferson County and the State of Kentucky for the taxes aforesaid, and has had possession and control thereof ever since, and has converted the same to its own use and benefit without paying any part of the taxes, which were liens thereon, as aforesaid.

12 The defendants, Oscar Fenley and E. W. Hays, were upon the re-organization of the defendant, Bank of Kentucky, into the defendant, National Bank of Kentucky, elected President and Cashier of the latter bank, respectively, and have ever since continued to hold and now hold the positions aforesaid.

The plaintiff states that neither of said defendants, Fenley and Hays, President and Cashier, of the defendant, National Bank of Kentucky, reported to the Auditor of Public Accounts, on or before July 1, 1900, the amount or value of the capital stock and surplus and assets of the defendant, Bank of Kentucky, received and then held by the National Bank of Kentucky in the re-organization aforesaid, in accordance with the provisions of said Hewitt Act for said taxation for *that* years.

Wherefore, the plaintiff prays for judgment fixing and assessing the capital stock, franchise, or intangible property of the defendant, Bank of Kentucky, at $2,748,028.90, for each of the years, 1899 and 1900, for taxation by the County of Jefferson, at the rates levied by the Fiscal Court of said County for said years, respec-
13 tively; and for the year 1900, for taxation by the State of Kentucky, at the rate fixed by law; but if the court shall determine the defendant, Bank of Kentucky, is not liable to an assessment of its property and franchise for State taxes for the year 1900, under the Revenue Act of November 11, 1892, then and in that event, the plaintiff prays that its capital stock and surplus shall be fixed and assessed for State taxation for said year under the provisions of said Hewitt Act, as follows, to-wit:

Its capital stock at $1,645,100.00, and its surplus (less an amount equal to ten per cent. of its capital stock), at $938,418.90; and that

the defendants, Bank of Kentucky, and National Bank of Kentucky, be required and compelled to pay the taxes to the County and State at the respective rates hereinabove set forth, as well as the twenty (20) per cent. penalty on the aggregate amount of said taxes due said County and State, as provided by law, and the costs incurred by the plaintiff in this proceeding, and for all other proper and general relief, to which the plaintiff may appear to be entitled.

COMMONWEALTH OF KENTUCKY,
By T. C. ALBRITTON,
Revenue Agent for the State at Large.
14 H. L. STONE,
Attorney for Plaintiff.
SAM'L B. KIRBY,
County Attorney of Jefferson Co.

The following is a copy of summons issued in above case, with return of sheriff thereon:

COMMONWEALTH OF KENTUCKY, *Jefferson County Court:*

To the Sheriff or any Constable of Jefferson County, Greeting:

You are hereby commanded to summons Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, President, and E. W. Hays, Cashier of said bank, to appear before the Jefferson County Court on the first day of its next term and answer a statement this day filed against them by the Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent for the State at large, and show cause why — should not be assessed for the years 1899 and 1900,
15 of certain personal property, tangible and intangible franchise and real estate, as fully set up and described in the statement filed, and warn them upon their failure to answer said statement the allegations of the same will be taken for confessed as true against them, and judgment will be rendered thereon according to law.

Given under my hand, as Clerk of the Jefferson County Court, this the 13th day of January, 1903.

W. J. SEMONIN, *C. J. C. C.*,
By JOS. J. SCHENE, *D. C.*

Executed Jan. 14, 1903, on Bank of Kentucky by delivering a copy of the within summons to E. W. Hays, Cashier of said bank, he being chief officer found in this county at this time.

E. T. SCHMITT, *S. J. C.*,
By H. WOODS, *D. S.*

Executed Jan. 14, 1903, on National Bank of Kentucky, by delivering a copy of the within summons to E. W. Hays, Cashier of said bank, he being chief officer found in this County at this time.

E. T. SCHMITT, *S. J. C.*,
By H. WOODS, *D. S.*

16 (On reverse side of summons.)
Came to hand, Jan. 13, 1903, at 3 P. M.
Executed Jan. 14, 1903, on Bank of Kentucky by delivering a copy of the within summons to Oscar Fenley, President of said bank, he being chief officer found in this County at this time.

E. T. SCHMITT, *S. J. C.*,
By H. WOODS, *D. S.*

Executed Jan. 14, 1903, on National Bank of Kentucky by delivering a copy of the within summons to Oscar Fenley, President of said bank, he being chief officer found in this County at this time.

E. T. SCHMITT, *S. J. C.*,
By H. WOODS, *D. S.*

April County Court. April 6, 1903.

STATE OF KENTUCKY, *Jefferson County:*

COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
BANK OF KENTUCKY, &c.

17 This day came parties by counsel, and by consent it is ordered by the court that within cause be and is, passed for answer until the 16th inst.
And at a County Court continued and held for the court aforesaid, on the 16th day of April, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
BANK OF KENTUCKY, &c.

Came the defendant, by its counsel, and filed response and answer herein.
The response and answer referred to in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiff,
vs.
BANK OF KENTUCKY, &c., Defendants.

Response and Answer of Defendants.

18 The defendants admit that the Bank of Kentucky was on, and for many years prior to September 15, 1898, a corporation chartered and existing under the laws of the State of Kentucky with power, among other things, to carry on the business of bank-

ing in the City of Louisville, County of Jefferson, State of Kentucky, and was then engaged in said business in the said City, County and State, and that said Bank of Kentucky continued to carry on the foregoing business therein until on or about May 1, 1900.

They admit that on September 15, 1898, and on September 15, 1899, and until May 1, 1900, defendant, Oscar Fenley was President and defendant, E. W. Hays, was Cashier of the said Bank of Kentucky.

They admit that the amount of the capital stock of the defendant, Bank of Kentucky, on Sept. 15, 1898 and on Sept. 15, 1899 and during the period from the latter date until on or about May 1, 1900, was as stated in the statement of the Commonwealth, and that the total value of the capital stock and surplus of the said Bank of Kentucky on the said two dates, and until May 1, 1900, was as stated in the said statement. But they deny that the said
19 capital stock or surplus, or any part thereof was subject to assessment or taxation by the County of Jefferson for the year beginning Sept. 15, 1898 and ending Sept. 14, 1899, or for the year beginning Sept. 15, 1899 and ending Sept. 14, 1900; or to state taxation for the year beginning Sept. 15, 1899 and ending Sept. 14, 1900. They deny that any amount of taxes was due or owing by the Bank of Kentucky to the County of Jefferson on the value of its intangible property, or franchise, for the year 1899 or for the year 1900.

They deny that the defendant, Bank of Kentucky, owes or ever owed, the sum of $4671.64, or any part thereof, for taxes to the County of Jefferson; or the sum of $4122.04, or any part thereof, as taxes to the County of Jefferson; or the sum of $13,053.13, or any part thereof as taxes to the Commonwealth, or that said amounts or any of them, or any part of them, were due, or are now due, from the said Bank of Kentucky to the said County of Jefferson or the State of Kentucky on any account.

They deny that the said Bank of Kentucky or the defend-
20 ants, Oscar Fenley or E. W. Hays, failed or refused to list or report the property, capital stock, surplus, franchise, or intangible property, for County taxes for the two years aforesaid, or for State taxation for the year aforesaid; that is they deny that the said Bank of Kentucky or the said Fenley or the said Hays failed to make any report which it was the duty of them, or any of them, to make for such County taxes or State taxation; and they deny that the said property of the defendant, Bank of Kentucky, was omitted from assessment for taxation for County purposes for the years 1899 or 1900 as of Sept. 15, 1898 or Sept. 15, 1899, in the sense that it should have been assessed; or that it was omitted from assessment for taxation for State purposes for the year 1900, as of September 15, 1899, in the sense that it should have been assessed.

It denies that the defendant, Bank of Kentucky, failed or refused to make any reports to the Auditor of Public Accounts under the Revenue Act of November 11, 1892, which it was required by law to make. It denies that it was ever required by law to make any of

said reports. It denies that the said Board omitted to make any assessment which it had the right to make. It denies that
21 any County taxes due July 1, 1899 and July 1, 1900, or ever due by said Bank of Kentucky have not been paid and that any taxes due the State for the year 1900 on the franchise of the Bank of Kentucky or its capital stock or surplus have not been paid.

The defendants admit that the Bank of Kentucky claims to have been entitled by law and by the decisions of the State and Federal Courts to pay state taxes only as required by the provisions of the Revenue Act of May 17, 1886, commonly called the Hewitt Act.

They deny that under the provisions of said Hewitt Act, the Bank of Kentucky owned, held or was liable, to pay the said sum of $12,338.25, or the sum of $4457.48, or any part thereof.

They deny that the defendant, Bank of Kentucky, or its President or Cashier or other officer or agent, was required to make any report to the Auditor on July 1, 1900, or any report which it did not make, or that the Bank of Kentucky failed to make any report which it was required by law to make.

They admit that on May 1, 1900, the defendant, Bank of
22 Kentucky, was organized under the provisions of the National Banking Act of the United States, and that it obtained authority from the Comptroller of the Currency to commence business on that day as a National Bank, under the name and style "National Bank of Kentucky," and they admit that the Bank of Kentucky transferred to the National Bank of Kentucky all of its property and assets, tangible and intangible, on May 1, 1900.

They deny that said assets were at that time under, or subject to any lien held by the County of Jefferson for any taxes for the years 1899 or 1900, or for any part thereof, or for any years. They deny that said assets, tangible or intangible, were under any lien held by the State of Kentucky for any taxes due from the defendant, Bank of Kentucky, or that there were any taxes so due.

They admit that the said National Bank of Kentucky became and now is a corporation organized and existing under the laws of the Congress of the United States, with power to carry on the business of a National Bank in said City of Louisville, County of Jefferson and State of Kentucky.

They deny that it took possession of any property or assets which were under or subject to any liens of Jefferson County or the
23 State of Kentucky. They deny that the said assets or any part thereof were ever under or subject to any lien in favor of said Jefferson County or State of Kentucky, for any amount.

2. Further answering these defendants say that the said Bank of Kentucky was created a body politic and corporate by the Act of the General Assembly of Kentucky, approved February 2, 1834; that the said corporation was duly organized under the terms of the said Act of Incorporation. By its original charter it was provided that it should continue a body politic and corporate until October 1, 1864.

By two Acts of the General Assembly of Kentucky, one approved

February 15, 1858, and one approved February 1, 1872, the charter life of the said Bank of Kentucky was so extended as not to expire until October 1, 1909; by the 15th Section of the original charter it was provided that the Cashier of the said Bank of Kentucky should pay to the Treasurer of the Commonwealth, twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the legislature might increase or diminish the same, but at no time should
24 the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank.

By an act approved February 12, 1836, the legislature exercised the right reserved and imposed the tax of fifty cents upon each share of said stock of the Bank of Kentucky.

By an act approved May 17, 1886, entitled "An Act to amend the Revenue Laws of the Commonwealth of Kentucky," commonly known as the Hewitt law, it was provided that the cashier of all States and National banks should annually, on the first day of July, make a report of their condition to the Auditor and pay into the State Treasury seventy-five cents on each share of their capital stock, and in addition, pay into said Treasury, on their surplus, undivided profit and accumulations in excess of ten per cent. of their capital stock, a tax at the same rate as real property should be assessed. And it was provided by said Act that the said taxation should be in full of all taxation—state, county and municipal—except that the real estate and buildings owned or used by the bank in conducting their business should not be exempt from taxation for municipal or county purposes, that such real estate alone might be taxed for county and municipal purposes as other real estate was taxed.

25 As a condition to its operation the said Act, in the 4th Section thereof, provided for a certain consent to be given by the stockholders of the said bank. This consent was given strictly in accordance with the said law by the stockholders of the Bank of Kentucky, on June 25, 1887.

The said Bank of Kentucky made the report under said Act and paid the taxes thereunder for every year from July 1, 1886 to July 1, 1899, both inclusive, and besides paid all the municipal and county taxes upon its real estate required to be paid by the said Act.

By an act approved March 22, 1900, it was provided, among other things, that "An Act to establish the Bank of Kentucky, approved February 16, 1834, and all amendments and extentions thereof, be and the same are hereby repealed."

There was an emergency clause to the said Act and the same took effect and was in force from and after its passage. There was a proviso in said Act, that if the said Bank of Kentucky, on or before May 1, 1900, should file in the office of the Secretary of State its written consent to pay taxes under State and local levies of 1900 and subsequent years, as provided in the Constitution and Rev-
26 enue Statutes of the State, the act should not go into effect as to said bank.

No such consent was filed, and thereupon and thereby the said Bank of Kentucky ceased to exist, on May 1, 1900.

And so it is that on the 1st day of July, 1900, the date at which the statement of the Commonwealth claims a report should have been made under the Hewitt Law, the said Bank of Kentucky, had, for more than two months, ceased to exist.

The defendants further state that on May 1, 1900, the defendant, the National Bank of Kentucky, was organized and began its charter life under the laws of the United States, particularly that body of Statutes styled the National Bank Act, and acquired by due process of law all of the assets of the said Bank of Kentucky, without any lien whatsoever upon them for any state or county taxes, and especially without any lien thereon for any of the state or county taxes attempted to be assessed by this proceeding.

And the defendants plead and rely upon said National Bank Act and the laws of the United States as a full defense against any claim the petitioner may make herein, either for the said taxes or
27 for any of them, or for any penalty thereon.

3. Further answering, the defendants say that heretofore, to-wit, on February 21, 1898, the defendant, Bank of Kentucky—sometimes styled, President, Directors and Company of the Bank of Kentucky, filed its bill of complaint in the Circuit Court of the United States for the District of Kentucky, sitting at Louisville, wherein it impleaded Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort, all of whom were duly served with process and entered their appearance and defended the said action.

The said bill of Complaint showed and pleaded in apt terms that the controversy presented therein between the complainant and the defendant was one within the jurisdiction of the said Court; viz, one arising under the constitution and laws of the United States and involving an amount greater than $20,000.

In the said bill of complaint it was alleged substantially as follows:

That the complainant was a corporation duly created by and organized under the laws of the State of Kentucky, its original
28 charter having been granted February 22nd, 1834, to continue for thirty years, and its charter life having been extended by two acts—one approved May 10th, 1858; and the other approved February 1st, 1872; that said Charter Life would not expire until February 1st, 1909.

The defendant, Samuel H. Stone, was impleaded as the Auditor of Public Accounts of the State of Kentucky; The defendant, Charles Finley, as the Secretary of State of the State of Kentucky; and the defendant, George W. Long, as the Treasurer of the State of Kentucky; the defendant, City of Louisville, as a municipal corporation; the County of Franklin as a municipal corporation; and the Board of Councilmen of the City of Frankfort as a municipal corporation.

The said Bill of Complaint set forth the corporation of the complainant and the extension of its corporate life. It further states that provision of its original charter in regard to taxation, and subsequent acts in relation thereto, and what had been the settled course of decision of the highest Court of Kentucky as to the amending of these provisions. It further sets forth the passage, on March 18th,

1876, of an act commonly called the Hewitt Law, and of the
29 acceptance by the complainant of its terms and of the reports by the complainant thereunder, and the payment of tax thereunder. It further recites the passage by the legislature of Kentucky of the Act of November 11th, 1892, wherein it was provided that banks should file certain reports on or before March 1st of each year, such reports to show the condition of the said Banks as of the 31st day of the preceding December and the duty of the said Auditor, Secretary of State and Treasurer to make an assessment under the said reports.

The bill of complaint further stated the amount of its capital stock as of the 31st day of December, 1894, 1895 and 1896, and the amount of its surplus; also what had been fixed by the three officers composing the State Board of Valuation and Assessment as its capital and surplus on December 31st, 1893, December 31st, 1894, December 31st, 1895, December 31st, 1896 and the *appointment* that they had attempted to make between the municipal corporation of the amount of such assessment.

The complainant set forth that this scheme of taxation under the Act of November 11th, 1892, had violated the contract made
30 between the complainant and the State under the Hewitt law, and that it was also violative of the constitution of the State of Kentucky and of the constitution of the United States.

The complainant also set forth various litigation which it had theretofore conducted, in which the complainant insisted that it had been adjudged that it would not be taxed otherwise than under the Hewitt Law.

The complainant further alleged that the defendants, the officers named would proceed to value the franchise of the complainant in the manner set forth in the Act of November 11, 1892, for the years 1895, 1896 and 1897 and certify such value to the County Clerk of Jefferson County, and that these assessments would be illegal.

The said bill of complaint contained the following prayer: "The premises considered, complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's capital stock under the said Act of November 11th, 1892, for the years 1895, 1896 and 1897 or any other years and that the said defendant,
Samuel H. Stone, be enjoined from certifying any such valu-
31 ation to the said several municipalities, and that the said several municipalities, the City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort, be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments under the Hewitt Law or under its Charter, no other or further taxes shall be exacted from it under any form or by any authority."

Defendants further say that as aforesaid all of the defendants answered the said bill of complaint. Issue having been joined the

said cause came on to be finally heard, and on June 4, 1898, the following order was entered:

"It is ordered by the Court that the preliminary injunction heretofore granted in the foregoing case be and the same is hereby continued until 25th day of June, 1898."

And on June 25th, 1898, the following decree was entered:

The Court, being advised, filed its opinion herein. It is therefore adjudged, ordered and decreed as follows:

32 1. The demurrer of the defendant, The City of Louisville, to the bill of complaint is hereby overruled; to which the said City of Louisville excepts.

2. The demurrer of the Board of Councilmen of the City of Frankfort to the bill of complaint is overruled; to which the said defendant excepts.

3. The demurrer of the County of Franklin to the bill of complaint is overruled; to which the said defendant excepts.

4. The demurrer of the defendants, Samuel H. Stone, Geo. W. Long and Charles Finley to the bill of complaint is overruled; to which the defendants except.

5. The plea of the Board of Councilmen of the City of Frankfort and the County of Franklin, defendants, to the bill of complaint is overruled; to which the said defendants except.

The defendants, The County of Franklin and the City of Frankfort, offered to file an amended answer; to which complain-t objected, and the motion to file is overruled; to which defendants except, and the amended answer is made a part of the record by this order.

33 6. And thereupon came the complain-t, by Humphrey & Davie, counsel, and filed herein replications to the answers of the City of Louisville and the Board of Councilmen of the City of Frankfort and the County of Franklin—

And by consent this cause came on to be heard for final decree.

The complainant read upon the hearing its bill of complaint and its amended bill of complaint herein and several exhibits filed herein, viz:

Exhibit No. 1, being the record of the proceeding- in the case of The Bank of Kentucky *vs.* The Franklin County Court and J. W. Gaines, sheriff.

Exhibit No. 2, being the record of the proceedings in the case of Bank of Kentucky *vs.* City of Frankfort.

Exhibit No. 3, also called in the bill Exhibit A, being the resolutions of the stockholders of the complainant accepting the Hewitt Bill. It is agreed that these resolutions were filed in due time and in accordance with law.

Exhibit No. 4, also called in the bill Exhibit B, being a record of the proceedings in the case of the Bank of Kentucky *vs.* Armstrong, sheriff, and The Franklin County Court.

34 Exhibit No. 5, also called in the bill Exhibit C, being the final judgment of the Franklin Circuit Court in the last named cause.

Exhibit No. 6, being the record of the proceedings in the case of the Bank of Kentucky *vs.* City of Frankfort.

Exhibit No. 7, also called in the bill Exhibit D, being the final judgment of the Franklin Circuit Court, entered in pursuance of the mandate of the last named cause.

Exhibit No. 8, also called in the bill Exhibit E, being the record of the proceedings in the case of the Bank of Kentucky *vs.* R. H. Thompson &c.

The defendant, The County of Franklin, read on hearing its answer, and the defendant, The City of Frankfort, read on hearing record of proceedings in the case of Board of Councilmen of the City of Frankfort, *vs.* L. C. Norman Auditor, &c, being called in the record Exhibit 9, and the defendant The City of Louisville, read in its answer and the stipulation between the complainant and the defendant City of Louisville, filed herein June 25th, 1898, together with the ordinances and special statutes herein mentioned and referred to and it is now adjudged, ordered and decreed, that the defendants, Samuel H. Stone, Charles Finley and Geo. W.
35 Long be and they are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898 or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the County Clerk of Jefferson County, or to any officer of the City of Louisville, or to the County Clerk of Franklin County, or to any officer of the Board of Councilmen of the City of Frankfort, or to the County of Franklin; and the defendants, The City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon such valuation; and the complainant by making payments in accordance with the Hewitt Law is discharged in full from all taxes to be extracted from it under any form or by any authority.

It is further adjudged, ordered and decreed, by reason of the several pleas of *res judicata* relied on by complainant in this Bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of Article 2 of the Act of the General Assembly of the
36 State of Kentucky, entitled "An Act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for County and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Comonwealth of Kentucky and the Act of November 11, 1892, in so far as they are intended to provide or do provide for

any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by Section- 1, 2 and 3 of Article 11 of the said Act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

37 And it is further adjudged that the complainant recover of the defendants its costs in this action expended."

The defendants say that the said decree has never been in any way modified, reversed or annulled, and still stand in full force and effect, and the defendants plead and rely upon the same as a defense to this proceeding. The defendants will, if desired, present to the Court the full record of the proceedings in the said cause.

Defendants say that in the years 1898, 1899 and 1900 the only method by which the property of the Bank of Kentucky could be assessed was under the Act of November 11, 1892, which provided for an assessment for all purposes—State, county and municipal,—by the Board of Valuation and Assessment or by the Hewitt Law, which provided that the banks should make reports as of July 1st of each year to the Auditor of public Accounts, and should make payment to him of taxes of a certain rate, and should not be subjected to any other State, county or municipal taxation, except upon the real estate of the bank used in its business; that under and by virtue of the decree aforesaid the Bank of Kentucky established the proposition that it could not be assessed under the Act

38 of November 11th, 1892. It has fully complied at all times with the Hewitt Law; made all reports and paid all taxes required of it under that Act; and to make an assessment against it in this proceeding would be in violation of the said decree and of the rights secured to these defendants under the constitution and laws of the United States and as fully set forth in the decree aforesaid. And defendants rely upon — as a full defense in this action, and severally to each claim set up herein.

4. The defendants further say that the National Bank of Kentucky, is a corporation organized under the law of the United States, particularly that body of laws styled the National Bank Act, and that there is no authority in this Court to assess any of the property of the said National Bank of Kentucky herein sought to be assessed, nor to fix any lien thereon, and that any proceedings herein which have the effect of assessing the capital or surplus of said National Bank of Kentucky or fixing any lien thereon are in violation of the laws of the United States; and they rely upon the exemption and immunity contained in said National Bank Act against any proceedings herein.

39 Wherefore the defendants pray that these proceedings may be dismissed.

HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Defendants.

And at a County Court continued and held for the Court aforesaid on the 23rd day of April, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
BANK OF KENTUCKY, &c.

Came plaintiff by its Counsel and filed demurrer herein, thereupon by consent of Counsel, it is ordered by the Court that the hearing of said demurrer be and the same is assigned to the 28th inst.

The demurrer referred to in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent for the State at Large, Plaintiff,
vs.
BANK OF KENTUCKY, Defendants.

Demurrer.

40 1. The plaintiff demurs to the first, second and third and fourth paragraphs of the Answer of the defendants herein because neither of said paragraphs states facts sufficient to constitute or support a defense to the plaintiff's causes of action for the assessment of the property of the defendant, Bank of Kentucky, for the County taxes as of September 15, 1898, for the year 1899, or as of September 15, 1899, for the year 1900.

2. The plaintiff also demurs to the first, second and third and fourth paragraphs of the defendant's answer filed herein because neither of said paragraphs states facts sufficient to constitute or support a defense to plaintiff's cause of action for the assessment of the property of the defendant, Bank of Kentucky, as of September 15th, 1899, for State taxes for the year 1900.

H. L. STONE,
SAM'L B. KIRBY,
Attorneys for Plaintiffs.

And at a County Court continued and held for the Court aforesaid on the 14th day of May, 1903, the following order was entered of record, to-wit:

41 THE COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
BANK OF KENTUCKY, &c.

By consent of Counsel the foregoing action is submitted on the demurrer heretofore filed to the answer.

And at a County Court continued and held for the County afore-

said on the *11th day of August, 1903*, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, &c.,
vs.
BANK OF KENTUCKY, &c.

This action having been submitted heretofore on plaintiff's demurrer to the defendant's answer, the opinion of the Hon. Judge Gregory was this day filed herein, and the Court being sufficiently advised, it is adjudged and ordered by the Court that the demurrer to the several paragraphs of the Answer be and is sustained, with two weeks' leave to defendants to amend.

The opinion referred to in the foregoing order is as follows:

42 Jefferson County Court.

COMMONWEALTH OF KENTUCKY, &c., Plaintiffs,
vs.
BANK OF KENTUCKY, &c., Defendants.

Opinion.

Upon this submission three questions are raised:—

1st. Whether or not, the claim of Jefferson County for taxes for the years 1899 and 1900 is concluded by the adjudication, pleaded in bar by the third paragraph of defendant's answer; 2nd, whether or not, that adjudication affects either County or State taxes for other years than 1895-1898, the tax for those years having been specifically enjoined; and 3rd, whether or not, conceding the sufficiency of this plea of *res judicata*, either of defendants or their property is liable for 1900 State and County taxes.

All of these questions have been exhaustively and ably discussed by Counsel on both sides. They will now be considered in the order above stated.

First.

It is conceded that in an action of the Bank of Kentucky *vs.* Stone, &c., the Circuit Court of the United States held, that
43 said bank had an irrevocable contract with the State under the Act of 1886, known as the Hewitt Law, and enjoined the State Board of Valuation and Assessment, City of Louisville, County of Franklin and City of Frankfort from proceeding under the Act of 1892, to collect*ing* revenue claimed to be due the state of Kentucky or any of said municipalities and that this adjudication became final.

It is clear, and seems to be conceded, that in view of later rulings in other cases by the Court of Appeals of Kentucky (19th Ky. L. R. 728) and by the Supreme Court of the United States (173 U. S. 636) this adjudication was incorrect. To the extent of the subject

matter then properly before it, the adjudication however erroneous, was, of course, binding upon the parties.

At the time of the institution of the suit in the Circuit Court of the United States, the belief was prevalent, that Jefferson County had no claim for taxes upon property located within the City of Louisville. It was not made a party to the suit and no relief was sought against it. The petition specifically prayed for judgment enjoining claims for taxes of the City of Louisville, City of Frank-
44 fort, and County of Franklin, not only for the years 1895-1898, but for all future years during its corporate existence and the judgment now relied upon, so decreed. Whilst it might, perhaps, be sufficient to plead an adjudication, enjoining the assessing power from assessing for a given time property for taxation by a certain municipality, in bar of its claim for tax for such time even without alleging that it was itself a party to such proceedings, it can hardly be claimed, that such an adjudication would be binding upon one whose rights were not sought to be affected and were not passed upon in any way. Even if Jefferson County had been a party to the proceeding and no relief sought against it, or adjudication of its rights had, such judgment could not possibly conclude its rights however similar to or intimately connected with, those of the other parties proceeded against. The ruling might be *instructed* as an interpretation of her rights or ordinarily absolutely controlling as a precedent, but in no possible sense could it be considered as an adjudication of those rights.

In the case of County of Henderson *vs.* Henderson Bridge Co., decided by the Court of Appeals June 19th, 1903, it was held that the County was not bound by a default judgment in an action
45 against the sheriff to enjoin collection of County tax, and in discussing this question the Court approves this rule, laid down in Sec. 178 of Freeman on Judgments:—

"Though its officer is a nominal party to a suit and the municipality is not joined with it, a judgment is conclusive for, or against, it, if it was the real party in interest, and as such prosecuted or defended the action." This doctrine seems perfectly sound and is eminently just. Applying to this case, we find that the Board of Valuation and Assessment in no wise defended the injunction suit for Jefferson County, for any claims of Jefferson County was entirely foreign to the litigation and it was thought to have no interest whatever in the subject of the controversy. While in a sense that Board represented the County, the levy or collection of its taxes were not entirely dependent upon the Board's action as under Sec. 4241, Ky. Stat., it could proceed as in this case, if the Board failed to act.

It is not alleged, that the judgment in Bank of Kentucky *vs.* Stone, &c., enjoined Jefferson County from collecting taxes or
46 that it enjoined the assessment of its property for the use of Jefferson County, as was the case with reference to the City of Louisville and all the other municipalities, and that ruling is itself based upon a plea of *res judicata* setting up judgments, in which, each of the municipalities in the Stone case were parties, but to

none of which was Jefferson County a party. In the Opinion in this case 88 F. R. 383, after reciting the conclusiveness of the judgments in the other cases, the Court says:—"This relieves the Court from re-examining that question as an original one between the present parties." It can hardly be doubted, that if Jefferson County had been a party to that suit, it never having been a party to the previous litigation, the Court would not have felt itself relieved from the re-examining the question as an original one between the Bank of Kentucky and Jefferson County, nor can it be at all doubted, that it would have adopted precisely the same rule it did adopt in the case of Northern Bank of Kentucky *vs.* Stone, 88 F. R. 987, affirmed by the Supreme Court of the United States 174 U. S. 409, and have held, that so far as Jefferson County was concerned there had been no adjudication against it, and that it was entitled to collect
47 its taxes notwithstanding the fact that similar claims of other municipalities were barred.

On page 419 of the opinion in the case of Northern Bank of Kentucky *vs.* Stone, the Court says:—"Our conclusion, therefore, is that the complainant bank can not in this controversy with the City of Lexington, Fayette County, City of Paris, and City of Covington, and with the Board of Valuation and Assessment, so *so* far as concerns the appointment and certification of the assessment by the Board to those municipalities, rely upon or derive any benefit from the decrees in the complainant's favor against Bourbon County." It is therefore entirely clear that none of said adjudications concluded the claims of Jefferson County.

Second.

In the original brief of Counsel for plaintiff, it is conceded, so far as the claim of the State for taxes, is concerned, that it must claim under the Hewitt Law, the question being *res judicata.* In the last brief filed by same Counsel, it is claimed, that this question is *res judicata* only so far as taxes for 1895-6-7-8 are concerned and that under various rulings of the Court of Appeals of Kentucky, a tax judgment is binding only as to the particular year or
48 years in litigation and is not conclusive as to the validity of taxes on the same property or against the same party for another year. This doctrine, so far as it goes, seems to be thoroughly established by the decisions recited from Kentucky Court of Appeals and in the recent case of Union & Planters' Bank of Memphis *vs.* City of Memphis, &c., reported in advance sheets of U. S. Supreme Court reports for May 15th, 1903, page 606, it is held, that the Federal Court will accord to judgments of State Courts the same force, and only so much, as the Supreme Court of the State gives them. The judgment, here relied on, is a judgment of a Federal Court, and the rule as to judgments in these Courts is that the doctrine of *res judicata* applies even in tax cases. New Orleans *vs.* Citizens Bank 167 U. S. 396.

This Court is of opinion, however, that quite a different question is presented by the record here from that considered in the State

Court Judgments. In the case here pleaded as *res judicata,* not only the taxes for 1895-6-7 and 8 were in controversy but one of the main purposes of the suit was to invoke the aid of a Court of equity to enjoin not only the particular tax then sought to be
49 enforced but to also enjoin future levies, during the period the complainent claimed to have established an irrevocable contract right to immunity under the Hewitt Law from the operation of the general tax laws. Indeed one of the grounds upon which the bank in that suit justified the invocation of the equitable jurisdiction of the Court, was to avoid a multiplicity of suits and have the whole question determined not only for the years 1895-1898, but for all years up to the expiration of the bank's charter in 1909. This claim was sustained by the Court, so that it would seem, that the right of the parties to that controversy with respect to taxes for future years within the life of the Bank's charter were as thoroughly litigated, as much in controversy, and as conclusively determined, as with reference to taxes already accrued. It was certainly competent for the bank to seek relief by injunction against future levies and multiplicity of suits. It did so by apt allegations in its bill of complaint. The question was specifically contested by defendants to the suit and the Court adjudged not only, that it was justified in invoking equitable relief on these grounds but that the ground for complaint was well founded and thereupon specifically ad-
50 judged, that future levies should not be made, on behalf of defendants to that suit. The plea of *res judicata* so far as State taxes are concerned is in the opinion of the Court thoroughly sustained.

Third.

The remaining question involves the determination of the extent and nature of the State's rights and remedies with reference to its tax claim of 1900, which it is admitted, has never been paid. It is claimed on behalf of defendant's Counsel, that property in question having belonged to the Bank of Kentucky, was during the time of such ownership, to-wit, until May 1st, 1900, only assessable under the Hewitt Law, but having disposed of it prior to July 1st, 1900, which, it is claimed, was the assessment day under the Hewitt Law, it could not be assessed against the Bank of Kentucky for 1900, and not becoming the property of the National Bank of Kentucky until May 1st, 1900, could not be properly assessed against it until September 15th, 1900, and then only for 1901 taxes. If this contention be correct, it suggests a woeful and inexcusable defect in our tax legislation. After a careful examination of both
51 the constitution and Statutes upon the subject, the Court is strongly of opinion, that no such yawning gap in the law exists and that such a conception arises from the practical difficulty of fixing liability and probable omission of the property from assessment rather than any lack of authority or right to make assessment or enforce collection.

Under Sec. 4241, Kentucky Statutes, it is made the duty of the County Court in cases of this nature to enter an order fixing the

value of property, "if it shall appear to the Court that the property is liable for taxation and has not been assessed." It is admitted, that this property has not been assessed and that it is liable for taxation, (except by reason of a supposed hiatus in the law, failing to provide for its assessment for this particular year under the circumstances alleged.)

By act of the legislature Sec. 4019 Ky. Statutes, and pursuant to mandates of the Constitution of Ky. 169-174 inclusive an annual tax is levied upon all property not exempt from taxation. It is not claimed that any of the property in question was exempt, but merely that it was assessable under the Hewitt Law of 1886. Under the Hewitt Law an annual tax is likewise levied. Therefore the
52 tax for 1900 was levied on property in question, it matters not so far as the lien created by the levy is concerned, how many times or when it changed hands, it remained in the Commonwealth the entire Fiscal Year 1900, *i. e.* July 1st, 1899 to July 1st, 1900, (See constitution of Ky. Sec. 169) and received the protection of her laws during that entire period. The question as to when the assessment day was or who was the owner on that day, affects merely the question of *personal* liability and not that of the right of the Commonwealth to proceed against the property. While the immunity from personal liability for taxes undoubtedly exists in favor of any one who acquires and disposes of property between assessment days; even though the ownership extend over a period of 364 days, the liability of the property, it remaining in the Commonwealth the entire year, is absolutely indisputable. The particular person against whom it is assessed is utterly immaterial, except for the purpose of fixing the personal liability, advising the party in interest as to extent of liability, and furnishing a practical and convenient means of collecting the tax without coercive sale of the property itself, Kentucky Statutes, Sec. 4056. Under the broad and imperative
53 mandate of both the Constitution and Statute, the property is made liable absolutely and at all events (unless of a class exempt from taxation). The fact that by change of ownership or omission from assessment, property may as a practical proposition escape taxation, in no wise relieves it from liability or lien, even though it be difficult or impossible to say, as between the various persons who have owned it, which should pay the tax. Assuming that July 1st, 1899, was the assessment day for 1900 tax on this property, that it was acquired from an individual July 2nd, 1899, and that on September 16th, 1899, it was transferred back to an individual, according to defendants' contention the Bank would not have to pay 1900 taxes, because its assessment day was July 1st, when it did not own the property, and the individual would not have to pay because on September 15th, 1899, his assessment day, he did not own it, yet between them it had been owned the entire year. In the same way the individual could sell to this bank, or some other having the assessment day any time from July 2nd to and including September 14th, and the bank re-sell to this or some other individual any time from September 16th, to, and including

June 30th, without liability and so on *ad infinitum*, thereby
54 permanently depriving the estate and other governmental institutions of any return whatever in exchange for the protection extended such property. It is not sufficient to say, that such practice would be a fraud and, therefore, disallowed. It would be entirely possible for such sales to be made in the utmost good faith, and, considering the long intervals between the two assessment days, it would be entirely possible for such transactions to be effected not only in good faith, but with great frequency and upon a very large sale. The apparent immunity of even actual exemption of both such parties from personal liability would afford no answer to the proposition, nor would it prove at all effectual to prevent the enforcement of the property's liability, by virtue of the lien created by the levy.

Take the converse of the proposition and an equally unjust and untenable conclusion is reached. An individual buys this property September 14th, and sells it to this bank any time before the following July 1st, and according to the rule that assessment day fixes the liability for a tax, the individual would have to pay because he was the owner September 15th, and the Bank would have to pay because it was the owner July 1st, and so on, if they or
55 others similarly situated would continue to make such sales between September 15th, and July 1st, and between July 1st and September 15th, the same property would have to be charged with taxes *twice* in each year. If it were at all necessary, to the enforcement of the lien, that the property should be assessed against some one, or to charge some one with primary or personal responsibility, this difficulty would be of easy solution by charging the one who owned it, at the conclusion of the Fiscal year (June 30th) on the ground that the property was in lien when he obtained it for a portion of the year's protection, it had received, and, that he himself was the immediate beneficiary of the remaining year's protection thereby completing the full benefit accruing to him and his property in exchange for which, the governing power exacts its taxes from him personally, or in any event, from the property. Or, if necessary, assessment might be made in the names of both or all who had owned the property during the Fiscal year.

That the Commonwealth has a lien upon this property or at least an inchoate lien, which is perfected by the assessment, when made, even though retroactive, seems to the Court to admit of no
56 serious doubt. Under Sec. 4021, Kentucky Statutes, such lien is expressly declared with reference to the property assessed, and in the same section provision is made for retroactive assessment with the limitation in such a case that "the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime." It can not be claimed that defendant, National Bank of Kentucky, comes within this exemption in as much as it affirmatively appears, that the two chief officers of that bank at the time of the transfer of assets, held corresponding positions with the Bank of Kentucky during the time the 1899 and 1900 taxes accrued or become assessible, they and the National Bank of Kentucky,

through them, being thereby chargeable with notice of this unpaid and unassessed claim for tax and the inchoate lien therefor, taking said assets *cum onore*.

In the case of Board of Councilmen of Frankfort *vs.* Mason & Ford Co., 100 Ky. 54, the Court of Appeals expressly held, that a claim of the City for taxes existed whether the tax payer's property had been assessed or not, if it were liable for assessment, and that such claim was not only a subsisting li bility against him, but a lien upon his propert*t*.

57 Again, giving to the contract established by the Bank of Kentucky under the Hewitt Law the utmost effect, that could possibly be claimed for it, it could not possibly be extended so as to cover the liability of this property for taxes for 1900. For the Hewitt Law to have applied, under the view of the defendant's counsel as to assessment day, the property would have had to be owned July 1st, 1900, by the Bank of Kentucky or some other bank having a similar contract. The bank would have had to make its report and pay the tax as provided by that law, or under Sec. 7, have lost its special immunities and beco e subject to taxation as other individuals or corporations. The record shows no report was made or tax paid for 1900. The Fiscal year 1901, being from July 1st, 1900, to June 30th, 1901, it is seen that the Bank of Kentucky did not own this *property* for any part of the Fiscal year, but it is admitted, that it was not only in existence in this State during the whole of that year, but continuously from and before September 15th, 1899, the assessment day for property generally. At the close of the Fiscal Year 1899, to-wit: June 30th, 1900, the Hewitt Law became *functus officio*, so far as its

58 effects upon actual tax payments on *this property* was concerned, but (not converting or applying to any part of the tax for the Fiscal year 1900) it afforded immunity neither against assessment nor payment for that year and this property so far as assessment or liability for 1900 taxes was concerned was as much liable to assessment for that year under the Act of 1892, as if the Hewitt Law had never existed. It was doubtless omitted from assessment as of September 15th, 1899, or December 31st, 1899, upon the idea that the bank would on July 1st, 1900, by compliance with the Hewitt Law bring the property under the operation of that law, but having failed to do so, Sec. 7 of the Hewitt Law becomes at once operative and relates back to the assessment day under existing law, removing every vestige of immunity or exemption, that might have been claimed under the Hewitt Law, and assessment made under the Act of 1892 of this Bank's assets would undoubtedly have been as binding under facts shown by this record, as the assessments made for 1901, or any subsequent or previous year, and not having been made, the property was omitted, and being liable, it becomes the imperative duty of the Court under Sec. 4241 to "enter an order fixing the value thereof."

59 It followed from the foregoing views that the demurrers to the several paragraphs of the answer should be sustained

and it is so ordered, with two weeks' leave to defendants to amend, if they so desire.

JAMES P. GREGORY, *Judge.*

Aug. 11, 1903.

And at a County Court continued and held for the Court aforesaid on the 25th of September, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY
vs.
BANK OF KENTUCKY.

Came defendants by counsel and filed amended response herein, and by consent of Counsel the same was controverted of record.

The amended response referred to in the foregoing order is as follows:

60 Jefferson County Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BANK OF KENTUCKY, Defendants.

Amended Response.

1. The defendants, amending their response herein, say that while it is true that the plaintiff has stated the amount of the capital of the defendant and its surplus correctly as it appears on the books, yet the assets of the said bank were not worth that sum measured by the rule for assessment, and would not have brought such sum for cash at a voluntary sale; and further, that for both the years mentioned in the information $200,000 of the capital of the Bank of Kentucky was assigned to and employed by a branch of the said Bank located at Frankfort, Kentucky, and, therefore, was not liable for assessment in Jefferson County. for County taxes.

2. The respondents further say that for the said years the capital and surplus of the Banks in Jefferson County were assessed at 60 per cent. on the face of the books, and that to assess the capital and surplus of the Bank of Kentucky at a higher rate than this
61 would be an unjust and unlawful discrimination, contrary to the Constitution of the State of Kentucky and to the Constitution of the United States and the 14th amendment thereof guaranteeing to all persons the equal protection of the law, and providing that no person shall be deprived of his property without due process of law.

HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Respondents.

And at a County Court continued and held for the Court aforesaid on the 18th day of December, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, State Revenue Agent,
vs.
BANK OF KENTUCKY, &c.

This cause again coming on to be heard, the defendant read in evidence, subject to exceptions for irrelevancy and incompetency, a stipulation dated December 1st, 1903; also subject to exemptions for irrelevancy and incompetency a stipulation dated December 15, 1903.

62 The plaintiff read in evidence, subject to exemptions for irrelevancy and incompetency, a stipulation dated December 16th, 1903.

The plaintiff filed exceptions to the statement of facts contained in the stipulations filed herein marked December 1st, 1903, and December 15th, 1903, and to so much of the testimony of Eugene Hancock and Oscar Fenley contained in their depositions filed herein, as set forth in said exception.

This was all the evidence offered by either party.

The cause was thereupon submitted to the Court, and the Court not being advised, takes time.

The stipulation mentioned in the foregoing order as dated December 1st, 1903, is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by, &c., Plaintiff,
vs.
BANK OF KENTUCKY, Defendants.

Stipulation.

It is stipulated herein that proceedings similar to the one herein taken against the defendants were taken in the Jefferson County Court, on June 23rd. 1902, against sundry banks in the

63 City of Louisville. The following are the facts in reference to such proceedings.

In the case of the Citizens National Bank, its capital and surplus, as of September 15th, 1898, was $615,000. It was assessed at $368,644; from which was deducted $21,150 value of tangible property. The net assessment was fixed at $347,494.

In the case of the Union National Bank, its capital and surplus of September 15th, 1898, was $635,000. Its assessment was fixed at $381,000; from which was deducted $1,200, value of property on which taxes had been paid, leaving balance net assessment $379,800.

In the case of the Louisville National Banking Company its capital and surplus, as of September 15th, 1898, was $256,000.

Its assessment was fixed at $154,080.

In the case of the Third National Bank, its capital and surplus as of September 15th, 1898, was $370,000. Its assessment was fixed at $220,680; from which was deducted $2,400, value of property on which taxes were paid, leaving net assessment of $218,280.

64 In the case of First National Bank its capital and surplus as of September 15th, 1898, was $804,000. Its assessment was fixed at $481,560.

In the case of the American National Bank its capital and surplus as of September 15th, 1898, was $850,000. Its assessment was $510,000. From this was deducted $68,000, value of tangible property on which taxes had been paid; leaving a net assessment of $442,000.

It is further stipulated and agreed that prior to the entry of the order making the assessments hereinabove set forth against said National Banks in the Jefferson County Court, the amount of assessment against each of the said banks had been agreed upon between counsel representing the same and the counsel for the Commonwealth in said proceedings, and the agreed assessment- reached in this manner were fixed in accordance therewith, and the amount of assessments were thus agreed upon by way of compromise and settlement between the counsel representing the parties in order to avoid an adjudication and upon certain legal questions which were about to be made by said National Banks, in defense of said pro-

65 ceedings, and among which defense was the alleged invalidity of the Act of March 21st, 1900, and the general Revenue Act of March 29th, 1902, providing for the retrospective assessment of shares of stock in National Banks under the levies of years prior to the passage of said act, or as of September 15th, 1898, for State and County taxes.

The foregoing stipulation is made subject to the right of either party to except thereto for irrelevancy or incompetency of the facts therein stated as evidence in this proceeding.

Dec. 1st, 1903.

S. B. KIRBY,
H. L. STONE,
Attorneys for Plaintiff.
HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Defendants.

The stipulation mentioned in the foregoing order as dated December 15, 1903, is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, State Revenue Agent, Plaintiff,
vs.
BANK OF KENTUCKY, &c., Defendants.

Stipulation.

66 It is stipulated and agreed between counsel for plaintiff and defendant that the following is a correct statement showing the assessment of State and National Banks, by the City Assessor of the City of Louisville, as of September 15 of the years given below:

	1898.	1899.
American National Bank	$300,769	$286,000
Bank of Commerce	984,699	724,703
Citizens' National Bank	290,000	301,497
First National Bank	317,500	407,854
German Bank	317,260	300,438
German Insurance Bank	258,623	355,356
German Security Bank	216,165	
Louisville National Banking Company	.....	129,793
Southern National Bank	.....	118,316
Third National Bank	129,000	129,626
Union National Bank	403,334	227,000
Western National Bank	256,920	180,876
Farmers' & D-overs Bank	138,625	
Bank of Louisville	141,000	
Columbia Finance & Trust Co	473,062	594,779
Louisville Trust Company	385,852	410,368
Fidelity Trust & Safety Vault Co	965,902	943,265
Bank of Kentucky	1,275,000	1,275,000

67 2. It is further stipulated and agreed that the foregoing statement may be read in evidence by the defendant herein, subject to exceptions by plaintiff for irrelevancy and incompetency.
Dec. 15/03.

SAM'L B. KIRBY,
H. L. STONE,
Attorneys for Plaintiff.
HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Defendants.

The stipulation mentioned in the foregoing order as dated December 16, 1903, is as follows:—

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, State Revenue Agent, Plaintiff,

vs.

BANK OF KENTUCKY, &c., Defendants.

Stipulation.

1. It is stipulated and agreed between Counsel for plain-
68 tiff and defendants, that the following is a correct statement showing the *the* assessments by the State Board of Valuation and Assessment of the franchises of intangible property, after deducting the value of the tangible property as stated, of the following named State Banks and Trust Companies located in the City of Louisville, Jefferson County, State of Kentucky, for State and County Taxes at the following rates for the following years, as well as the amount of the capital and surplus of each of said institutions, and the percentage, the total assessed value of such property, tangible and intangible, bears to the amount of the capital and surplus of each of said institutions, to-wit:

69

	Assessed value of franchise of intangible property as of Dec. 31, 1898, for taxes of 1899, after deducting assessed value of tangible property as of Sept. 15, 1898.	Assessed value of tangible property as of Sept. 15, 1898, for taxes of 1899.	Amount of capital and surplus as of Dec. 31, 1898.	Percentage total assessed value bears to amount of capital and surplus for taxes of 1899.
Farmers & D-overs Bank...	$317,838.22	$20,265.00	$332,242.41	101-7/10%
Louisville Trust Co....	$612,250.00	$293,850.00	$906,100.00	100%
Fidelity Trust & Safety Vault Co.....	$1,429,066.35	$172,285.00	$1687,951.18	94-8/10%
Columbia Finance & Trust Co.....	$885,168.06	$281,776.00	$1152,400.00	101-2/10%
German Security Bank.....	$220,687.00	$3,063 00	$229,000 00	97-7/10%
Bank of Commerce.....	$1,520,180.01	.....	$1602,686.15	94-8/10%
German Bank.....	$465,205.00	$84,795 00	$550,000.00	100%
German Insurance Bank....	$542,481.00	$39,725.00	$549,500.00	105-9/10%
Western Bank.	$250,000.00	.....	$350,000.00	71-4/10%
Bank of Louisville.....	$390,000.00	.....	$430,000.00	96-6/10%

	Assessed value of franchise of intangible property as of Dec. 31, 1899, for taxes of 1900, after deducting assessed value of tangible property as of Sept. 15, 1899.	Assessed value of tangible property as of Sept. 15, 1899, for taxes of 1899.	Amount of capital and surplus as of Dec. 31, 1899.	Percentage total assessed value bears to amount of capital and surplus for taxes of 1900.
70 Louisville Trust Co...	$601,052.75	$305,047.25	$906,100.00	100%
Fidelity Trust & Safety Vault Co...	$1477,546.95	$174,066.52	$1651,835.28	99-9/10%
Columbia Finance & Trust Co.	$932,174.40	$246,569.46	$1162,633.00	101-3/10%
German Security Bank.....	$225,032.37	$3,967.63	$226,000.00	100%
Bank of Commerce.....	$1148,524 97	$18,483.00	$1167,007.97	100%
German Bank.....	$445,475.55	$60,544 45	$506,000.00	100%
German Insurance Bank....	$536,816 60	$29,492.00	$549,500.00	100%
Western Bank.	$257,713.78	$25,372.26	$282,000.00	100%

2. It is further stipulated and agreed that the foregoing statement may be read in evidence by the plaintiff herein subject to exceptions by defendants for irrelevancy or incompetency.

3. It is further stipulated and agreed that the amount of the capital and surplus of said Bank of Kentucky on the face of its books as of December 31, 1898, was $2,740,000 and that the same as of December 31st, 1899, was $2,745,000. No assessment was made in either year of tangible property by the County Assessor.

This Dec. 16, 1903.

SAM'L B. KIRBY,
H. L. STONE,
Attorneys for Plaintiff.
HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Defendants.

71 The deposition referred to in the foregoing order is as follows:

The deposition of Eugene Hancock and Oscar Fenley, taken on the 4" day of November, 1903, at the office of Messrs. Humphrey, Burnett & Humphrey, at Louisville, County of Jefferson and State of Kentucky, to be read as evidence on behalf of the deft. in an action between Com. of Ky., &c., Plaintiff, and the Bank of Kentucky, Defendant, now pending in the Jefferson County Court.

Appearances: For Plaintiff, Col. Stone. For Defendant, Judge Humphrey.

EUGENE HANCOCK, being duly sworn and examined by Judge Humphrey, as Attorney for the Defendant, deposed as follows:

1. Will you please state whether you have made a tabulated statement from the books of the Assessor of Jefferson County of the

assessments made by him of sundry banks as of September 15th, of the years 1899, 1900, 1901 and 1902?

A. Yes sir.

2. Please read that statement to the stenographer.

A. It is as follows:

"Assessments made by Assessor of Jefferson County on
72 September 15th of the years marked below:

	1899.	1900.	1901.	1902.
American National Bank.....	$440,633	$534,400	$405,298	$487,540
National Bank of Kentucky.....	.....	1520,487	1514,244	1587,000
Citizens National Bank.....	312,067	371,964	438,706	453,807
First National Bank.....	411,433	479,731	471,453	451,378
Louisville Nat'l Banking Co.....	130,902	159,660	164,582	173,299
Southern National Bank.....	127,500	137,590	143,003	178,849
Third National Bank.....	133,449	142,552	117,612	101,446
Union National Bank.....	320,582	401,247	418,455	437,181

By Col. STONE: I object to the testimony as being incompetent and irrelevant, and decline to cross examine.

Also the deposition of OSCAR FENLEY, taken at the same time and place, and in the same behalf. The said witness being first duly sworn by me and examined by Judge Humphrey on behalf of the defendant, deposed as follows:

73 1. You are the President of the National Bank of Kentucky, and have been so since its organization on May 1st, 1900, I believe.

A. Yes, sir.

2. You were prior to the time President of the State Corporation sometimes styled the President, Directors and Company of the Bank of Kentucky?

A. Yes, sir.

3. The National Bank of Kentucky has been assessed for State and County Taxes by the County Assessor beginning with the Fiscal year September 15th, 1900. Will you please state now what was the assessment of the National Bank of Kentucky for that year by the Assessor of Jefferson County?

Objected to by Counsel for Plaintiff as calling for incompetent and irrelevant testimony.

A. $1,520,487 on personal property subject to equalization as shown on tax receipt.

4. That was the assessment upon the capital and surplus of the bank exclusive of tangible property?

A. Yes, sir.

5. Can you tell us what the tangible property amounted to, the real estate, assessed for the same year?

74 A. $53,517.

6. Do you answer the same question for the assessment of September 15th, 1901?

Counsel for plaintiff objects to the question as calling for incom-
etent and irrelevant testimony.

A. On personal property not subject to equalization $1,514,244.

7. What was the other property assessed against the bank.

A. $38,455.

8. That was all the assessment against the bank for that year?

A. I think so. That is all the bills I have.

9. Answer the same question in regard to the assessment on the apital and surplus of the bank for the year 1902.

Objected to by Counsel for plaintiff as calling for incompetent nd irrelevant testimony.

A. I have not in my possession the bills for the assessment of 1902, as the tax has not yet been paid. A memorandum I have here shows that the assessment on personal property is $1,587,000, on the tangible property $69,762.27.

10. In the fall of 1900, the City Assessor assessed the cap-
75 ital and surplus of the National Bank of Kentucky. What was the assessment?

Counsel for plaintiff objected to the question as calling for incompetent and irrelevant testimony.

A. The City Assessor's assessment for the fall of 1900 on the shares of stock after deducting the assessed value of the tangible property was $1,520,420.

11. And the tangible was what?

A. $39,256.

12. In the fall of 1901 the City Assessor assessed the capital stock and surplus of the National Bank of Kentucky. What was the assessment?

A. The City Assessor assessed the value of shares of stock after deducting the assessed value of tangible property—that is the way the bill reads—at $1,514,000.

13. And the tangible property was what?

A. $38,431.

14. Answer the same question as to 1902.

Objected to by Counsel for plaintiff as calling for incompetent and irrelevant testimony.

A. The value of shares of stock after deducting the assessed value of all tangible property was $1,517,000. The tangible prop-
76 erty is $37,846.

15. Has the Bank of Kentucky received any notice of an attempted bank assessment by the City of Louisville for the years 1899, and 1900?

A. It has.

16. This notice, I believe, came from the Board of Equalization?

A. I think so.

17. What was the assessment for those two years by the Board of Equalization of which you have received notice?

A. For the year 1899, there was an assessment made against the Bank of Kentucky, value of franchise after deducting assessed value of all tangible property, $1,275,000. For 1900, valuation of franchise after deducting assessed value of all tangible property $1,275,000.

18. You have been connected with the bank in the City of Louisville for a great many years, have you not?

A. Yes, sir.

19. How many?

A. Thirty-two years.

20. Are you fairly well acquainted with the capital and
77 surplus of the different National Banks in Louisville?

A. I am.

21. Mr. Hancock had given a deposition, this morning, showing what was the assessments made by the Assessor of Jefferson County on September 15th, of the years 1899, 1900, 1901 and 1902, of the various National Banks in Louisville. From your knowledge of the capital and surplus of those banks, and looking at that list will you please state upon what basis that assessment is substantially.

A. That is substantially sixty per cent. of the valuation of the capital and surplus of the different banks, as I understand it.

22. Can you state generally, without being entirely accurate, the capital and surplus of the American National Bank?

A. The capital of the American National Bank is $800,000. Its surplus, I think, is about $160,000.

23. What about the Citizens National Bank?

A. It has a capital of $500,000, and I think its surplus is $250,000.

24. The First National Bank?

78 A. The capital of the First National Bank is $500,000, and it has a surplus of $250,000.

25. The Louisville National Banking Company?

A. That has a Capital of $250,000, and a surplus, I would say, of about $25,000.

26. The Southern National?

A. I think their Capital is $250,000, with a surplus of about $25,000.

27. The Third National?

A. Their capital is $200,000, and a surplus of about $30,000.

—. The Union National Bank?

A. The capital of the Union National Bank is $500,000 and a surplus of $100,000, I think. You understand that the surplus is a varying amount. It is not fixed as the capital of a bank.

29. It sometimes is more and sometimes less?

A. Sometimes more and sometimes less. It depends entirely upon the business operations of a bank as to what the surplus is.

79 30. What, in your judgment, is the fair value for assessment of the capital and surplus of the Bank of Kentucky as of September 15th, 1898, and September 15th, 1899?

A. Sixty per cent. of its capital and surplus.

Cross-examination by Col. STONE:

31. In a statement of the pleadings in this case it is admitted that the capital stock of the Bank of Kentucky on September 15th, 1898, and also on September 15th, 1899, was $1,645,100. That is correct, is it not?

A. Yes, sir.

32. It also appears in the same way in this case that the surplus at the same dates of said bank amounted to $1,102,928.90. Now please state whether or not the two amounts mentioned did or did not represent the fair cash value of the intangible property or capital stock of said bank at the dates mentioned respectively?

A. It represented the book value.

33. From your knowledge as President of the Bank of Kentucky at the dates stated, what was the fair cash value of the intangible property of said bank at those dates?

80 A. That is a very difficult question to answer. As an operating bank and a bank running along and doing its business steadily I feel that the book value of the assets of the bank is the actual value, but on a sale or speedy effort to collect in the assets of the bank I do not think they would realize that amount. The history of other banks who have gone through the liquidating process bears me out in forming that conclusion.

34. With respect, however, to this particular bank of which you were President at those dates, and with your knowledge of its condition and the value of its assets, what difference would you make in ascertaining the fair cash value of those assets of stock and surplus, between the book value as stated and the fair cash value? What percentage, in other words, in your judgment and with your knowledge of its assets, and the manner in which the bank was conducted would be the difference between the book value and the fair cash value at those dates?

A. Well, that question would be a very difficult question to answer from the condition of things. Some days you might sell the bank, if you could find a purchaser, for one price. At

81 another time it would be very difficult. At this time it is very difficult to collect anything on any of these bank assets. In answer to your former question I stated that I considered sixty per cent. a fair valuation for taxation purposes, as I stated based upon the liquidating value. I am not willing to admit that all the assets of the Bank of Kentucky are not perfectly good, but the realization of the book value is something you can not do in a minute. You can not sell for cash, because it is very difficult to find anybody who has cash to buy it.

35. Well, it is your judgment that I am asking for, as to the fair cash value of the capital stock and surplus of the Bank of Kentucky on September 15th, 1898, and September 15th, 1899. If you can arrive at it in making a deduction of any percentage or otherwise, please do so.

A. Well, any answer that I would make to that question would be absolutely a guess.

36. Well, that is one form of expressing a judgment. Let us have what your judgment is.

A. I will have to do some figuring on that. Well, I would make a guess of $2,700,000.

82 37. What did the Capital stock sell on the market at those dates approximately per share?

A. My recollection is that Bank of Kentucky stock in 1896, sold for about $150 a share. There has been a gradual increase in the market value of the stock since 1896 until it is about $190 a share. For those particular years I do not remember.

38. What would be your best judgment?

A. I would say about $160 or $170 per share.

39. I now show you a statement from Messrs. J. W. & D. S. Green, stock and bond brokers of this City, under date of September 23rd, 1903, addressed to myself, with respect to the market values and quotations of Bank of Kentucky stock at certain dates in 1898, 1899 and 1900. Please examine the same, and state whether or not in your judgment it conformed to your recollection of such values at the dates mentioned?

A. I notice from the paper which you handed me that Mr. Green reports that the price of Bank of Kentucky stock September 15th, 1898, was $175 per share, and that on September 18th, 1899, it was 194 a share and on May 1st, 1900, it was 181 per share.

83 This is more than I thought the market price was for the stock at that period, but I have no reason to say that his statement is not absolutely correct.

40. Will you file that statement and make it a part of your deposition for identification?

A. I do so.

It is stipulated and agreed that the Messrs. Green would testify as set forth in that letter.

41. You have been asked in your main examination concerning certain notices of assessment by the Board of Equlization of the City of Louisville for the year 1899, and 1900. The bank has never paid the tax on such assessment, has it?

A. Not to the City of Louisville for those years.

42. That is what I am inquiring about. The bank on the contrary contests payment of any tax to the City for those years, does it not?

A. It does.

43. The assessments of the stock of National Banks of this City under the law are made by local assessors, are they not?

84 A. Yes, sir.

44. And the assessments of the franchises of State banks in this City since the year 1892, and under existing laws, are made by the Board of Valuation and Assessment, for State and County taxation, where they are made regularly, are they not?

A. I think so.

By Judge HUMPHREY:

45. In the year 1898 and in the year 1899, the bank of Kentucky had $200,000 of its capital employed in its branch at Frankfort, did it not?

A. It did. It was set apart and used by the branch at Frankfort. No part of it was used in the bank here.

46. Will you give any instances in your mind of banks that have liquidated in Louisville?

A. The Falls City Bank, The Merchants National Bank, the Kentucky National Bank, The Masonic Savings Bank, The Fourth National Bank and the Second National Bank have all liquidated within the last ten or fifteen years. My recollection of the Kentucky National Bank is that it had a million dollars capital and $200,000 surplus. Its capitalization was cut half in two or reduced to $500,000. Then the liquidation of the bank, my impression
85 is, that on this $500,000 it only paid in the neighborhood of sixty cents on the dollar, $60 per share. It may have a few assets yet not collected. I think that is practically a fair illustration of the result in most banks. Some of them do better than others.

47. Is it or not a fact in the experience of banking in Louisville that a liquidation bank does not realize anything like the value of its capital and surplus?

A. I think so.

By Col. STONE:

48. You have been asked about several banks that were practically insolvent, have you not, the Kentucky National Bank, The Fourth National Bank, the Second National Bank and the Merchants National Bank?

A. They suspended payments in 1893.

49. Those four banks mentioned in the last question were consolidated, the assets put together to form the present American Nation Bank, were they not, capitalized at $800,000?

A. The capitalization of the American National Bank is $800,000 and the stockholders of those old banks I think generally became stockholders in the American National Bank, and the assets
86 of the various banks were thrown into the American National Bank as a part of its capital organization. Whether that was universally the case or not I do not know, but practically so, I imagine.

50. Take the case of the Bank of Louisville which had a charter something similar to the Bank of Kentucky. Is it not a fact that its stock sold on the market at about sixty cents on the dollar of its par value, and that it liquidated and the sto-kholders received about $110 per share?

A. I think that is right, yes, sir.

51. That occurred within the last five or six years?

A. That is since 1893, I don't remember the date. They liquidated as a going concern.

52. Is it not a fact that the Bank of Kentucky had practically no insolvent assets when it was a going concern in September, 1898, and September, 1899, insolvent or worthless assets?

A. The ones this bank had in 1898, and 1899, I do not remember. We had some, that amount of which I don't know.

53. When it became a National Bank on May 1st, 1900, at what estimate or valuation did the National Bank of Kentucky receive the assets of the old Bank of Kentucky?

87 A. At about $2,700,000. That is my recollection.

54. Was stock issued by the National Bank of Kentucky for that sum, or did stock in the National Bank merely take the place of stock in the State Bank, and was the same surplus continued in the new bank as in the old?

A. There was slight re-organization of accounts made necessary on account of operating under the charter of a National Bank. The stock remained the same, and as old certificates were presented for transfer new certificates were issued in the new bank. The stock is the same.

55. Were the assets, the stock and surplus worth more or less in July, 1900, in your judgment than on May 1st, 1900?

A. Practically the same.

56. You have spoken of $200,000 of the capital stock of the Bank of Kentucky being used by a branch of that bank at Frankfort on September 15th, 1898, and September 15th, 1899. Were separate certificates issued for the stock of the branch at Frankfort from those issued in the mother bank at Louisville?

88 A. No, sir.

57. Did the holders of any certificates of stock in the Bank of Kentucky participate in the profit or dividends on the $200,000 employed at Frankfort, as well as the rest of the stock employed here?

A. Yes, sir.

58. You speak of this matter as relating to the County tax, altogether do you not, not affecting the claim of the State if it has a valid claim for State tax?

A. That is right.

John W. & D. S. Green, Stock & Bond Brokers.

249 Fifth Ave., Bet. Main & Market Sts.

LOUISVILLE, KY., *September* 23, 1903.

Mr. Henry L. Stone, City Hall, City.

DEAR SIR: Your favor of the 22nd. duly received, and as requested therein, we have looked up the quotations for Bank

89 of Kentucky stock as our record shows them on the dates that you have given above, viz:—

1898	Bid.	Asked.
Sept. 15	175	177
Dec. 27	176	178
1899		
Sept. 18	194	196
Dec. 27	190	195
1900		
May 1st	181	185

We have no record of actual sales. These are the quotations, as given.

If we can serve you in any way, please command us and oblige,

Yours very truly, JOHN W. & D. S. GREEN.

Exhibit with dep. of Mr. Fenley.

CHAS. A. GRAHAM,
N. P., J. Co., Ky.

STATE OF KENTUCKY, *Jefferson County:*

90 I, Chas. A. Graham, examiner, do certify that the foregoing deposition- of Eugene Hancock and Oscar Fenley were taken pursuant to agreement, before me, in my presence, at the time and place, and in the action mentioned in the caption, the said witness- having been first sworn by me, that the evidence they should give in the action should be the truth, the whole truth and nothing but the truth, and their statement reduced to writing by me, in their presence both parties by attorney being present, the signature- of said witnesses being waived by consent.

Given under my hand this 14th day of Nov. 1903.

CHAS. A. GRAHAM,
N. P., J. C., Ky.

The exception mentioned in the foregoing order is as follows:

Jefferson County Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, State Revenue Agent, Plaintiff,
vs.
BANK OF KENTUCKY, &c., Defendants.

Exceptions.

91 1. Plaintiff excepts to the statement of facts contained in the stipulation filed herein marked December 1, 1903, by defendants concerning the assessment of the shares of stock in certain National banks for State and county taxes for the year 1899, as of September 15th, 1898, because the facts therein stated are not competent or relevant testimony upon the issues involved in this proceeding.

2. The plaintiff excepts to the whole of the testimony of Eugene Hancock and the table contained therein showing assessments by the County Assessor on September 15th, 1899, 1900, 1901 and 1902, of the shares of stock in certain National banks of the City of Louisville for State and County taxes, because the facts therein stated are not competent or relevant testimon*t* on the issues involved in this proceeding.

3. The plaintiff excepts to the statement of facts in the stipulation filed by defendants marked December 15th, 1903, showing as-

sessments of the shares of stock in State and National banks by the City Assessor of the City of Louisville as of September 15th, 1898, and 1899, because the facts therein stated are not competent or relevant testimony upon the issues involved in this proceeding.

4. The plaintiff excepts to all of the testimony of Oscar
92 Fenley contained in his deposition taken by defendants concerning the assessment of the shares of stock of certain National Banks by the County Assessor as of September 15th, 1899, 1900, 1901 and 1902, and concerning the amount of the capital and surplus of such banks, also to all his testimony concerning the assessment made against the Bank of Kentucky by the City Assessor for the City taxation for the years 1899 and 1900.

SAM'L B. KIRBY,
H. L. STONE,
Attorneys for Plaintiff.

And at a County Court continued and held for the Court aforesaid on the 28th day of December, 1903, the following order was entered of record, to-wit:

COMMONWEALTH OF KENTUCKY, by, &c.,
vs.
BANK OF KENTUCKY, &c.

The opinion of Judge Gregory was this day filed herein.
93 The opinion referred to in the foregoing order is as follows:

Jefferson Circuit Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agt., Plaintiff,
vs.
BANK OF KENTUCKY, &c., Defendants.

Opinion as to Value of Assets.

Sec. 172 of the Constitution of Kentucky leaves no possible doubt as to the standard by which all assessments by whatever officer or officers, should be made. It is the imperative duty of the Court to ascertain the value of the omitted property, as of the dates it should have — assessed. While the standard of valuation is clearly and immutably fixed, the ascertainment of the fair cash value of something, that is not cash, but to be valued as if it were under given conditions converted into cash, when it is not in fact so converted, is attended with some difficulty. As the Court is entirely limited to the record in this case in arriving at an assessment, it becomes necessary, in the first place to pass upon the exceptions filed to the evidence
94 submitted. These exceptions all relate to valuations placed by other assessing officers at other times upon the property of defendant and other similar institutions.

While these assessments may serve the purpose of throwing a more or less distinct side-light upon the question as to the value of the property under consideration at the times in question, and the statements of the assessing officers, if furnished, showing how these valuations were arrived at, might have been really instructive, it is perfectly manifest, that such evidence is not the best evidence obtainable upon the question in issue. If it appeared beyond peradventure, that all other banks had been assessed upon the basis of 5%, 50%; or 500% of the amount of their capital stock and surplus, that fact could not warrant or justify this Court in fixing defendant's assessment in the slightest below or above "its fair cash value, estimated at the price it would bring at a fair voluntary sale."

The Court is of the opinion, that exceptions filed by plaintiff, to stipulation of December 1st and December 15th, 1903; to testimony of Eugene Hancock and to that part of testimony of Mr. Fenley concerning other assessments, should be sustained and it is ordered so.

95 Defendant's counsel suggest that its assessments should not be increased by reason of its having failed, in accordance with what it believed was its right, to give in an *assent* and in this view the Court entirely concurs. The sole remaining question is for the Court to ascertain from the testimony, the proper valuation to be placed upon this property.

Under the view taken as to the competency of proof, this must be determined entirely from statements of Mr. Fenley as to the value of the bank's assets and the statement of Mess. Green as to the market value of the stock of defendant.

In answer to question 30, Mr. Fenley puts "the fair value for assessment" at 60% of capital and surplus, and in answer to question 34 states that this estimate is made upon the liquidating value. In answer to question 33 he states that he thinks the book value, is the actual value of an operating bank, and in answer to question- 35 and 36, fixes $2,700,000 as the fair cash value of the capital stock and surplus as of September 15th, 1898, and September 15th, 1899.

In answer to question 52, he states, that the assets of the Bank of Kentucky were accepted by the National Bank of Kentucky at about $2,700,000.00 May 1st, 1900.

96 According to the lowest quotations of defendant's stock, as shown by the statement of Mess. John W. & D. S. Green, that of September 15th, 1898, its assets in the open market were considered worth $2,878,925.00. The fixing of this assessment does not involve a guess as to what these assets would have brought if forced or sprung suddenly upon the market with no one prepared to buy, nor what they would have brought under exceptional conditions with a buoyant market and a number of competent purchasers engaged in a spirited contest to procure the same. Neither of such sales would have met the condition of a fair voluntary sale, laid down by the constitution. A fair voluntary sale contemplates a sale by one who is willing to sell, but not compelled to, and the existence of a purchaser willing and able to purchase at a fair price.

These seem to the Court to have been the exact conditions, which

obtained when these assets were transferred to the National Bank of Kentucky, and the testimony of Mr. Fenley referred to above, fully warrants the presumption, that the transfer valuation of $2,700,000.00 May 1st, 1900, was not materially different from the fair cash value, as of September 15th, 1898, and September 15th, 1899.

97 The Court is therefore of opinion under the evidence and the clear standing of valuation prescribed by Sec. 172 of the Constitution of Kentucky, that the valuation of said property should be placed at $2,700,000.00 for State purposes for 1900 taxes and at $2,500,000.00 for County purposes for both the years 1899 and 1900, the difference of $200,000.00 being deducted from the assessment for County purposes by reason of capital employed in the branch at Frankfort. The judgment tendered has been filled out in accordance with these views and is herewith returned signed.

JAMES P. GREGORY, *Judge.*

Dec. 29th, 1903.

The Final Judgment entered on December 29, 1903, is as follows:

Jefferson Circuit Court.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent for the State at Large, Plaintiff,

vs.

BANK OF KENTUCKY, Defendants.

Final Judgment.

98 This proceeding, having been heretofore submitted on plaintiff's demurrer to the several paragraphs of the answer of the defendants, which demurrer the Court, in a written opinion, which is now ordered to be made part of the record, sustained to each paragraph of the defendants' answer, and the defendants having filed an amended response, which was controverted of record—this proceeding is now submitted in chief, and the Court being fully advised from the pleadings and proof offered by the parties, now adjudges that the franchise or intangible property of the defendant, Bank of Kentucky, was omitted from assessment for the taxes of the County of Jefferson for the Fiscal years 1899 and 1900, and for the taxes of the State of Kentucky for the Fiscal year 1900; that the franchise or intangible property of said defendant bank was lawfully assessable for taxes of the County of Jefferson in and for the Fiscal years 1899 and 1900, and for the taxes of the State of Kentucky in and for the Fiscal year 1900, the said defendant Bank, as well as the defendant, National Bank of Kentucky, having failed or refused to report or list the shares of stock and surplus of said defendant, Bank of Kentucky, for State taxation and to pay the State taxes

99 thereon for the year 1900 as required by the Hewitt Act of May 17th, 1886; that the franchise or intangible property owned and held by said defendant Bank in the Fiscal year- 1899 and

1900 was then subject to assessment and is still subject to retrospective assessment for the taxes levied on all taxable property by the Fiscal Court for the County of Jefferson, in and for said Fiscal year; that the franchise or intangible property owned and held by the said defendant Bank in the Fiscal year 1900 was then subject to assessment for State taxes by reason of the failure or refusal of said defendant Bank of Kentucky, or its assignee, the defendant National Bank of Kentucky, to report or list the shares of stock and surplus of the defendant Bank of Kentucky for State taxes, and to pay such taxes in and for said Fiscal year as required by the provisions of the Hewitt Act aforesaid, and said defendant Bank's franchise or intangible property is therefore subject to retrospective assessment for the State taxes in and for the Fiscal year 1900. And it is now adjudged that the fair cash value of the franchise or intangible property of said Bank, estimated at the price the same would bring at a fair voluntary sale, be and the same is now assessed and fixed
100 by the Court at Two Million Five Hundred Thousand ($2,500,000.00) Dollars, for the taxes of Jefferson County, in and for each of said Fiscal years, 1899 and 1900, and Two Million Seven Hundred Thousand ($2,700,000.00) Dollars for the taxes of the State of Kentucky in and for the Fiscal year 1900.

The Court further adjudges that under the levy of seventeen (17) cents on each One Hundred (100) dollars of the assessed value of all property subject to taxation by the Fiscal Court of said County, in and for the Fiscal year 1899, the plaintiff is entitled to recover of the defendant, Bank of Kentucky and National Bank of Kentucky (to which *the* latter bank the property and assets of the former bank were transferred and delivered while under the statutory lien for the amount of the County taxes for the Fiscal years 1899 and 1900, and for the State taxes for the year 1900), for the use and benefit of Jefferson County, the sum of Four Thousand Two Hundred and Fifty ($4,250.00) Dollars; that under the levy of fifteen (15) cents on each One Hundred ($100) Dollars of the assessed value of all property subject to taxation by the Fiscal Court of said County in and for the Fiscal year 1900, the plaintiff is entitled to re-
101 cover of the said defendant banks, for the use and benefit of said *County*, the further sum of Three Thousand Seven Hundred and Fifty ($3,750.00) Dollars; that under the levy fixed by law of Forty-seven and one-half (47½) cents on each One Hundred ($100) Dollars of the assessed value of all property subject to State taxes in and for the Fiscal year 1900, the plaintiff is entitled to recover of the said defendant bank for such *State* taxes the sum of Twelve Thousand Eight Hundred and Twenty-five ($12,825.00) Dollars, that the plaintiff is entitled to recover the further sum of Four Thousand One Hundred and Sixty-five ($4,165.00) Dollars, being the Statutory penalty of twenty (20%) per cent. on the aggregate amount of taxes due on the assessments aforesaid for the use and benefit of T. C. Albritton, Revenue Agent for the State, for County and State purposes; and that the plaintiff recover its costs herein expended, of said defendant-, Bank of Kentucky and National Bank of Kentucky.

It is further adjudged that the Clerk of this Court shall certify to the Auditor of Public Accounts and to the Sheriff of Jefferson County a description of the property; that is to say, the franchise or
102 intangible property of the defendant, Bank of Kentucky, herein assessed as aforesaid for County taxes for the Fiscal years 1899 and 1900, and for the State taxes for the year 1900, and the amount of the assessment for such taxation in each of said years, together with the amount of the penalty aforesaid and costs of assessment by this proceeding to be taxed by said Clerk—all of which taxes, penalty and costs shall be collected and accounted for by the Sheriff of Jefferson County as other taxes and penalties are required to be collected, and the Clerk of this Court shall enter the assessment aforesaid in the book kept by him for that purpose, showing the date of the assessment, the name of the defendants, Bank of Kentucky and National Bank of Kentucky, against whom the assessments aforesaid have been made herein, and the value fixed thereon by the Court herein, as required by law.

To the foregoing judgment the defendants except and pray an appeal to the Jefferson Circuit Court, which is granted.

JAMES P. GREGORY, *Judge.*

Dec. 29th, 1903.

103 I, W. J. Semonin, Clerk of the County Court of Jefferson County in the State of Kentucky, certify that the foregoing sixty-two pages contain a true and complete transcript of the record in the case of the Commonwealth of Kentucky by T. C. Albritton, Revenue Agent for the State at large, *vs.* Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, President, and E. W. Hays, Cashier of said Bank.

In Testimony Whereof, I hereunto set my hand this 5th day of January, 1904.

W. J. SEMONIN,
Clerk Jefferson County Court, Kentucky.

Thereupon on the 8th day of January, 1904, the following appeal bond was executed and filed in the Clerk's office:

COMMONWEALTH OF KENTUCKY, *Jefferson County:*

Jefferson Circuit Court.

36209.

COMMONWEALTH OF KENTUCKY, etc., Plaintiffs,
vs.
BANK OF KENTUCKY, etc., Defendants.

Appeal Bond.

104 The defendants having prayed an appeal to the Jefferson Circuit Court, from the judgment of the Jefferson County

Court, rendered 29th day of December, 1903, for ($24,990) Twenty-four thousand, nine hundred and ninety dollars.

Now we covenant that the Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, President and E. W. Hays, Cashier of said banks, shall satisfy and perform the judgment of the Court that may be rendered against them upon the appeal herein.

Witness our hands this 8th day of January, 1904.

BANK OF KENTUCKY, AND [SEAL.]
NATIONAL BANK OF KENTUCKY,
By OSCAR FENLEY, *President,* [SEAL.]
J. M. ATHERTON. [SEAL.]

Attest: W. L. WELLER, JR., *Clerk,*
By JNO. H. PAGE, *D. C.*

STATE OF KENTUCKY, *Jefferson County, sct:*

J. M. Atherton states that he is a resident of the State of Kentucky, residing in Jefferson County and Louisville City; that he is
105 worth $50,000.00 beyond the amount of his debts, and has property in said State subject to execution of the value of $50,000.00. J. M. ATHERTON.

Sworn to before me by J. M. Atherton this 8th day of January, 1904.

JNO. H. PAGE, *D. C.*
For W. L. WELLER, JR., *Clerk.*

Thereupon on the 8th day of January, 1904, the Clerk issued the following supersedeas:

Jefferson Circuit Court.

To Hon. James P. Gregory, Judge Jefferson County Court of Jefferson County, in the State of Kentucky:

You are hereby enjoined from all proceedings on a judgment rendered in favor of Commonwealth of Kentucky by T. C.
106 Albritton, Revenue Agent for the State of Kentucky, against Bank of Kentucky, for $24,990.00 and $— costs, the said Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, President, and E. W. Hayes, Cashier of said banks, having appealed to the Jefferson Circuit Court, and given bond and security, according to law, in my office as Clerk of said Court, and you are hereby required to return the papers to said office.

Witness W. L. Weller, Jr., Clerk of said Court, this 8th day of January, 1904.

W. L. WELLER, JR., *Clerk,*
By R. KALTENBACHER, *D. C.*

The return of the sheriff on the foregoing supersedeas is as follows, to-wit:

Came to hand January 8th, 1904, at 12:30.

Executed January 15th, 1904, on Hon. James P. Gregory by delivering to him a copy of the within supersedeas.

E. T. SCHMITT, *S. J. C.*,
By R. O. DORSEY, *D. S.*

107 Thereupon on the 8th day of January, 1904, the Clerk issued the following summons:

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We command you to summon The Commonwealth of Kentucky by T. C. Albritton, Revenue Agent for the State at large, to appear before the Judge of the Jefferson Circuit Court, in twenty days from service hereof, to answer an appeal taken to said Court by Bank of Kentucky and others from a judgment rendered in favor of Commonwealth of Kentucky, by Hon. James P. Gregory, Judge Jefferson County Court for said County for $24,990.00 debt, and $— costs.

Witness W. L. Weller, Clerk of said Court, this 8th day of January, 1904.

W. L. WELLER, JR., *Clerk.*
By R. KALTENBACHER, *D. C.*

The return on the foregoing summons is as follows, to-wit:

Came to hand January 8th, 1904, at 12:30, P. M.

Executed January 13th, 1904, on T. C. Albritton, Revenue Agent for State of Kentucky by delivery to him of a copy of the within summons.

E. T. SCHMITT, *S. J. C.*
By WM. H. DRESCHER, *D. S.*

108 At a Court held on the 9th day of January, 1904:

Came parties by counsel and filed a stipulation herein.

Said stipulation filed herein on the 9th day of January, 1904, is as follows, to-wit:

Jefferson Circuit Court, Chancery Branch, First Division.

BANK OF KENTUCKY and NATIONAL BANK OF KENTUCKY, Appellants,

vs.

COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Appellee.

Stipulation.

It is hereby stipulated and agreed between counsel for appellants and appellees as follows:

1. The appellee hereby enters its appearance to this appeal.
2. The Judge of the Jefferson Circuit Court, Chancery Branch, Second Division, having been of counsel for the appellee in
109 the Jefferson County Court, this case is to be heard in the Chancery Branch, First Division, and is to be heard upon the transcript of record of the Jefferson County Court, which is to have the same force and effect as if the original record were filed on this appeal.

This 8th day of January, 1904.

HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Appellants.

JEFFERSON COUNTY,
By SAMUEL KIRBY, *Att'y.*
H. L. STONE,
Attorney for Appellee.

At a Court held on the 23rd day of January, 1904:

This action was set at rules on the 18th inst. by the defendants.

On motion of the defendants, ordered that this action be and it is assigned to the 28th inst. for hearing.

110 At a Court held on the 28th day of January, 1904:

By agreement of parties, by counsel, it is ordered by the Court that this action be and it is postponed upon the docket until the 9th inst. of February, 1904.

At a Court held on the 9th day of February, 1904:

On motion of the Bank of Kentucky by counsel, it is ordered by the Court that this action be and it is postponed upon the docket until February 16th, 1904.

At a Court held on the 16th day of February, 1904:

Came parties, by counsel and this action having been fully heard, and the Court not being advised, it is ordered that it be and it is submitted.

At a Court held on the 2nd day of April, 1904,

The Court being advised, delivered a written opinion, which is endorsed on the wrapper of the pleadings herein.

111 Said opinion delivered on the 2nd day of April, 1904, is as follows, to-wit:

This is an appeal from a judgment of the Jefferson County Court assessing property belonging to the defendant, the National Bank of Kentucky, for County taxes for 1899, and 1900, and for State taxes for 1900.

The question of values is concluded by the judgment of the County Court: only questions of law are reviewable here.

The law questions presented here are the same as those argued below. I have carefully examined the record including Judge Gregory's exhaustive and clearly cut opinion of August 11, 1903, and am entirely satisfied that he has decided the law questions correctly. As an opinion of this Court would be a mere repetition of Judge Gregory's opinion, I shall merely adopt his opinion as the opinion of this Court, and affirm his judgment.

Counsel will draw a proper order.

SHACKELFORD MILLER, *Judge.*

112 At a Court held on the 9th day of April, 1904:

This proceeding having been heretofore submitted in chief on the appeal to this Court from the Jefferson County Court by the defendant and appellants, Bank of Kentucky and National Bank of Kentucky, against the plaintiff and appellee, Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent, and the Court being sufficiently advised, filed its written opinion herein on April 2nd, 1904, which is ordered to be made a part of the record, and in pursuance of said opinion it is now ordered and adjudged that the judgment of the Jefferson County Court entered herein December 29th, 1903, be and the same is affirmed and adopted by this Court as follows:

The franchise or intangible property of the defendant, Bank of Kentucky, was omitted from assessment for the taxes of the County of Jefferson for the Fiscal years 1899 and 1900 and for the taxes of the State of Kentucky for the Fiscal year 1900; that the franchise of intangible property of the said defendant bank was lawfully assessable for taxes of the County of Jefferson in and for the Fiscal years 1899 and 1900, and for the taxes of the State of Kentucky in and for the Fiscal year 1900, the said defendant bank, as

113 well as the defendant, National Bank of Kentucky, having failed, or refused to report or list the shares of stock and surplus of the said defendant, Bank of Kentucky, for State taxation, and to pay the State taxes thereon for the year 1900, as required by the Hewitt Act of May 17th, 1886; that the franchise or intangible property owned and held by said defendant bank in the Fiscal years 1899 and 1900 was then subject to assessment and is still subject to retrospective assessment for the taxes levied on all taxable property by the Fiscal Court for the County of Jefferson, in and for said Fiscal years; that the franchise or intangible property owned and held by the said defendant bank in the Fiscal year 1900 was then subject to assessment for State taxes by reason of the failure or refusal of the said defendant Bank of Kentucky, or its assignee, the defendant National Bank of Kentucky, to report or list the shares of stock and surplus of the defendant Bank of Kentucky for State taxes, and to pay such taxes in and for said Fiscal year as required by the provision of the Hewitt Act aforesaid, and said defendant bank's franchise or intangible property is therefore subject to retrospective assessment for the State taxes in and for the Fiscal year 1900.

114 And it is now adjudged that the fair cash value of the franchise or intangible property of said bank, estimated at the price the same would bring at a fair voluntary sale, be and the same is now assessed and fixed by the Court at Two Million, Five Hundred Thousand ($2,500,000.00) Dollars for the taxes of Jefferson County, in and for each of said Fiscal years, 1899 and 1900, and at Two Million, Seven Hundred Thousand ($2,700,000.00) Dollars for the taxes of the State of Kentucky in and for the Fiscal year 1900.

The Court further adjudges that under the levy of seventeen (17) cents on each one hundred ($100.00) dollars of the assessed value

of all property subject to taxation, by the Fiscal Court of said County, in and for the Fiscal year 1899, the plaintiff is entitled to recover of the defendants, Bank of Kentucky and National Bank of Kentucky (to which latter bank the property and assets of the former bank were transferred and delivered while under the statutory lien for the amount of the County Taxes for the Fiscal years 1899 and 1900, and for the State taxes for the year 1900), for the use and benefit of Jefferson County, the sum of Four Thousand Two Hundred and Fifty ($4,250.00) Dollars; that under the
115 levy of fifteen (15) cents on each One Hundred ($100.00) Dollars of the assessed value of all property subject to taxation by the Fiscal Court of said County in and for the Fiscal year 1900, the plaintiff is entitled to recover of the said defendant banks for the use and benefit of the said County, the further sum of Three Thousand, Seven Hundred and Fifty ($3,750.00) Dollars; that under the levy fixed by law of forty-seven and one-half (47½) cents on each one hundred ($100.00) dollars of the assessed value of all property subject to State taxes in and for the Fiscal year 1900, the plaintiff is entitled to recover of the said defendant banks for such State taxes the sum of Twelve Thousand, Eight Hundred and Twenty-five ($12,825.00) Dollars; that the plaintiff is entitled to recover the further sum of Four Thousand, One Hundred and Sixty-five ($4,165.00) Dollars, being the Statutory penalty of twenty per cent. (20%) of the aggregate amount of taxes due on the assessment aforesaid for the use and benefit of T. C. Albritton, Revenue Agent for the State, for County and State purposes; and that the plaintiff recover its costs herein expended of said defendants, Bank of Kentucky and National Bank of Kentucky.

116 It is further adjudged that the Clerk of the County Court shall certify to the Auditor of Public Accounts and to the Sheriff of Jefferson County a description of the property; that is to say, the franchise or intangible property of the Bank of Kentucky, herein assessed as aforesaid for County taxes for the Fiscal years 1899 and 1900, and for the State taxes for the year 1900, and the amount of the assessments for such taxation in each of said years, together with the amount of the penalty aforesaid and costs of assessment by this proceeding to be taxed by said Clerk,—all of which taxes, penalty and costs shall be collected and accounted for by the Sheriff of Jefferson County as other taxes and penalty are required to be collected and the Clerk of the County Court shall enter the assessment aforesaid in the book kept by him for that purpose, showing the date of the assessment, the name of the defendants, Bank of Kentucky and National Bank of Kentucky, against whom the assessments aforesaid have been made herein, and the value fixed thereon by the Court herein, as required by law.

To the foregoing judgment the defendants and appellants, Bank of Kentucky and National Bank of Kentucky, except and pray an appeal to the Court of Appeals, which is granted.

117 STATE OF KENTUCKY, *County of Jefferson, set:*

I, W. L. Weller, Jr., Clerk of the Jefferson Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 92 pages contain a full, true and complete transcript of the record and proceedings in the case wherein Commonwealth of Kentucky by T. C. Albritton, Revenue Agent, is plaintiff and the Bank of Kentucky and National Bank of Kentucky, are defendants, #36209, an action lately pending in the aforesaid Court, Chancery Branch, First Division as the same appears of record and now on file in my said office.

Witness my hand, as aforesaid, this 26th day of April, 1904.

W. L. WELLER, JR.,
Clerk of the Jefferson Circuit Court,
By LEWIS MERIWETHER,
Deputy Clerk.

Transcript fee $28.75.

118 With the foregoing transcript the appellants filed a statement in the office of the clerk of said court, and which is in words and figures as follows:

Court of Appeals of Kentucky.

BANK OF KENTUCKY and NATIONAL BANK OF KENTUCKY, Appellants,
vs.
COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Appellee.

Statement.

The judgment from which this appeal is taken was rendered April 9, 1904, by the Jefferson Circuit Court, Chancery Branch, First Division, and may be found on page 89 of the record.

No summons is necessary.

HUMPHREY, BURNETT & HUMPHREY,
Attorneys for Appellants.

119 Be it remembered that on the 1st day of November, 1904, at a Court of Appeals held at the Capitol at Frankfort, Ky., the following order was entered, to-wit:

BANK OF KENTUCKY, &c.,
vs.
COMMONWEALTH OF KENTUCKY, by, &c.

Jefferson, Chy. (1st) Division.

Came appellant- by counsel and filed grounds and moved the court to grant an oral argument herein, which motion is submitted.

The grounds mentioned in the foregoing order are as follows:

Court of Appeals of Kentucky.

BANK OF KENTUCKY and NATIONAL BANK OF KENTUCKY, Appellants,
vs.
COMMONWEALTH OF KENTUCKY, by T. C. ALBRITTON, Revenue Agent, Appellee.

Statement and Motion for Oral Argument.

This was a proceeding taken in the Jefferson County Court
120 by the Revenue Agent against the Bank of Kentucky, to assess its property for county taxes for the fiscal years 1898-1899 and 1899-1900, and for State taxes for the year 1899-1900. The charter of the Bank of Kentucky, which was granted in 1835, was repealed by an act of the legislature of Kentucky approved March 22, 1900, that act providing that the charter of the Bank of Kentucky should stand repealed unless the bank should, on or before May 1, 1900, file in the office of the Secretary of State its written consent to pay taxes under state and local levies of 1900 and subsequent years. The Bank of Kentucky did not file this assent, and thereupon its charter stood repealed as of May 1, 1900. On that day the National Bank of Kentucky was formed, and took over the assets of the said bank. The County Court and the Circuit Court held that on a proceeding by T. C. Albritton, Revenue Agent, in the name of the Commonwealth of Kentucky, the bank could be taxed for the fiscal years 1899-1900 for state taxes, and for the fiscal years, 1898-1899 and 1899-1900 for county taxes. It is insisted that by the
121 judgment rendered in the Circuit Court of the United States, affirmed by the Supreme Court of the United States, the Bank of Kentucky established its claim for relief from all kinds of taxation except under the Hewitt law; that it paid all taxes under the Hewitt law during its existence as a bank; that the decision of the Circuit Court of the United States as affirmed by the Supreme Court of the United States and as construed in the Deposit Bank *vs.* Frankfort, 191 U. S., 499, is a complete answer to all the claims of the Commonwealth in this case, and that to attempt to tax the bank as is herein done by the judgment of the county court, as affirmed by the Circuit Court, is in violation of the Constitution and laws of the United States as not giving full force and credit to the judgment of the Circuit Court of the United States, and as violative of a contract of the Bank of Kentucky under the Hewitt law as found to exist in the former litigation.

We have stated thus briefly the contentions that will be made in this case. Other questions will arise as to the effect of the transmutation of the state bank upon the cessation of its charter—May 1, 1900—into a National bank, and as to the effect of the Na-
122 tional Bank Act upon the attempt to fasten upon the assets of the National Bank a retroactive assessment upon property belonging to the old state bank. The fact that the County Court found against our contention, and that this was affirmed by the Cir-

cuit Court, shows beyond doubt that there is something to be said upon the other side; but we submit that this brief statement will leave the Court in no doubt that the questions involved in this case are of such importance and such novelty as to call for an oral discussion before the full court. We therefore respectfully move the Court to pass this case to a convenient time for an oral hearing.

Respectfully,

HUMPHREY, HINES & HUMPHREY,
Attorneys for Appellants.

And afterwards on the 2nd day of November, 1904, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered, to-wit:

123 BANK OF KENTUCKY, &c.,
vs.
COMMONWEALTH OF KENTUCKY, by, &c.

Jefferson, Chy. (1st) Division.

The Court being sufficiently advised it is considered that appellants' motion for oral argument herein, be and the same is sustained, and said case is passed for oral argument to the January term.

And afterwards on the 22nd day of February, 1905, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered, to-wit:

BANK OF KENTUCKY, &c.,
vs.
COMMONWEALTH OF KENTUCKY, by, &c.

Jefferson, Chy. (1st) Division.

This case coming on for hearing was argued by H. L. Stone and S. B. Kirby for appellee, and A. P. Humphrey for appellant- and submitted, with ten days' leave to parties to file printed briefs.

124 Be it remembered that on the 12th day of June, 1906, at a Court of Appeals held at the Capitol at Frankfort, the following judgment was entered, to-wit:

BANK OF KENTUCKY, &c., Appellants,
vs.
COMMONWEALTH OF KENTUCKY, by, &c., Appellees.

Appeal from Jefferson Circuit Court, Chy. (1st) Div.

The Court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that the judgment be affirmed and that the appellee recover of the appellant- 10 per cent. damages on amount

of the judgment superseded herein. Which is ordered certified to said Court.

It is further considered that the appellee recover of appellants its costs herein expended.

125 And on said day the Court delivered the following opinion:

Court of Appeals of Kentucky.

JUNE 12, 1906.

BANK OF KENTUCKY and NATIONAL BANK OF KENTUCKY, Appellants,

vs.

COMMONWEALTH OF KENTUCKY, by, &c., Appellees.

Appeal from Jefferson Circuit Court, Chy. (1st) Div.

Opinion of the Court by Judge Paynter.

The question involved in this case is the property formerly owned by the Bank of Kentucky, and transferred to the National Bank of Kentucky, liable for taxes to Jefferson County for the years 1898-9, and 1900, and for State taxes for the year 1899-1900.

The Bank of Kentucky was a corporation organized under the laws of this State, and prior to 1899 was engaged in the bank-
126 ing business in the City of Louisville, with a branch in the City of Frankfort. It was chartered long before what is commonly known in this State as the Hewitt Act of 1886, became a law. It accepted the provisions of the Hewitt Act and paid its taxes under it, except the years here in question. The charter of the bank was subject to amendment or repeal, so adjudged by this Court and the Federal Court. It was the purpose of the present Constitution to establish a uniform system of taxation in this State. Under the Hewitt Act the bank was not required to pay either county or municipal taxes. The amount which is paid the State was in lieu of all taxes. Under the Constitution the Hewitt Act could not continue in force. So, to meet the new condition of things, the General Assembly of Kentucky, in 1892, passed a law providing for taxation of banks as contemplated by the Constitution. However, the question arose as to whether the banks, and among which the Bank of Kentucky, had an irrevokable contract under the Hewitt law, and this Court, in what is known as the Bank Tax Cases, 97 Ky., 590, adjudged that the banks had an irrevokable contract under the Hewitt law, and could only be required to pay taxes under its pro-
127 visions. There were other cases pending in the courts at the time of this decision, and this Court in Deposit Bank of Owensboro *vs.* City of Owensboro, 102 Ky., 174, overruled the previous opinion, holding that banks situated like the Bank of Kentucky did not have an irrevokable contract, and further held that

they were required to pay taxes under the present Constitution, and the revenue law of 1892. This last opinion created some apprehension in the minds of the officials of the Bank of Kentucky, and it filed its bill in the Federal Court, in which it pleaded the previous adjudication in the state courts wherein its alleged contract with the Commonwealth had been established, and obtained an injunction against the City of Louisville, the City of Frankfort and the County of Franklin, and the several State officers, constituting the State Board of Valuation and Assessment. The Federal Court held that the judgment in the Bank Tax Cases, 97 Ky., 590, established the bank's claim to a contract with the State. (Bank of Kentucky *v.* Stone, etc., 88 Fed. Rep., 383.)

The legislature of Kentucky saw the inequality and the lack of uniformity in the assessment and payment of taxes, resulting
128 from the decision of the Court, and concluded that the Bank of Kentucky should not continue to do business and only pay taxes under the Hewitt law, when its competitors in business were paying under the revenue law of 1892, which required them to pay municipal and county taxes from which the Bank of Kentucky was entirely free, except as hereinafter adjudged.

The Federal Court adjudged that the Bank of Kentucky did not have an irrevokable contract with the State, giving it exemption from the payment of county and municipal taxes, but held that the question was *res judicata*, and therefore had the lawful right to refuse to pay taxes to the counties and municipalities which were parties to the action wherein it was held it had an irrevokable contract under the Hewitt law. In view of these decisions, and in order to correct the manifest injustice that had resulted from the erroneous opinion, holding that the bank had an irrevokable contract under the Hewitt law, the legislature passed an act, approved March 22, 1900, which reads as follows:

"Whereas, by virtue of a recent decision of the Supreme Court of the United States, all banks of this State, both State and Na-
129 tional, are now required to pay State and local taxes in Kentucky, except the Bank of Kentucky, the Farmers Bank of Kentucky and the Deposit Bank of Frankfort, which three last named banks, by virtue of said decision, are now claiming exemption from all State and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof; also an act entitled 'An act to incorporate the Farmers Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof; also an act entitled 'An act to incorporate the Deposit Bank of Frankfort, approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed. Provided,

that if said banks or either of them, on or before May 1st,
130 nineteen hundred, file in the Secretary of State's office their or its written consent to pay taxes under State and local levies of nineteen hundred and subsequent years, as provided in the Constitution and Revenue Statutes of this State, the bank or banks thus agreeing, shall be excepted from the operation of this act."

Under what is known as the Act of 1856 the legislature had the right to repeal the charter of the Bank of Kentucky, although it was powerless, while it permitted it to do business, to require it to pay taxes except under the provisions of the Hewitt law, and the Bank of Kentucky recognized that the right to repeal its charter existed. Those interested in that bank organized the National Bank of Kentucky, and on May 1st, 1900, transferred its assets to the latter bank. The county of Jefferson was not a party to the proceeding in the State court wherein it was adjudged that the Bank of Kentucky had an irrevocable contract under the Hewitt law. It was not a party to the proceedings in the federal court wherein it was adjudged that by

reason of the adjudication in the State court the bank had
131 an irrevocable contract. As the Bank of Kentucky had not paid its taxes for the years stated, either to the State, or the county of Jefferson, under the Hewitt law, or otherwise, this proceeding was instituted for the purpose of having the property assessed and taxed for the benefit of Jefferson county and for the State for the years stated.

The claim of the Bank is, that as the State Board of Valuation & Assessment was enjoined from assessing it for the taxes in the proceeding of the Bank of Kentucky *v.* Stone, that the county of Jefferson is bound by that decision, and therefore not entitled to require the bank to pay the taxes sought to be recovered. It claims that under the Hewitt law its property should have been assessed as of the date of July first of each year, and that as it ceased to exist on May 1st, 1900, and transferred its property to the National Bank of Kentucky, it is not liable to pay taxes for that year.

As we have said, this court had decided in 102 Ky. that institutions similar to that of the Bank of Kentucky were required
132 to pay municipal and county taxes as well as State taxes. Under that opinion it would follow that the Bank of Kentucky should have paid taxes to the county of Jefferson. Under the opinion in the federal court the same conclusion is reached, because that court held that where a municipality was not a party to the proceeding, it was not bound under the doctrine of *res judicata*. In discussing this question in the Northern Bank case, that court said:

"The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent, as that relation is usually understood in law. The State may, through its

legislative branch, confer upon and withdraw from, the counties and cities power of taxation, but when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by agent for a principal; it is by a *quasi* inde-
133 pendent government, for the benefit of the people within its limits. The legislature, if not restrained by the Constitution, may, by contract with individuals, limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof, either by the State or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is contending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are to be spent, not for the State at large, but for the convenience and benefit of the people within its limits."

We think the reasoning of the Court is conclusive of this question. It follows from this that it was the duty of the Bank of Kentucky to pay the County of Jefferson its taxes for the years in question.

But it is urged that it is not entitled to these taxes because the State Board of Valuation and Assessment, whose duty it was
134 to assess the property, was a party to the proceeding in the case of Bank of Kentucky *v.* Stone, and therefore the County of Jefferson is bound by that judgment. This Court in the case of City of Henderson *v.* Henderson Bridge Co., 25 Rep., 421, had under consideration substantially the same question as here involved. In that case the Court said:

"A person or municipality is not bound by former litigation, unless it was a party, either actually or by its representative. Under our Statute, the fiscal court has control of the affairs of the county, and the sheriff is only a tax collector, in no wise a representative of the county in the management of its affairs, and the county is not therefore, bound by any adjudication to which it was not a party.
* * *

"Thus, it is the duty of the assessor to assess the taxpayers. But it would not be maintained that a default judgment suffered by an assessor, enjoining him from assessing the property of a taxpayer, would bar the State or the municipality from proceeding under Sec. 4241, Kentucky Statutes, to have omitted property assessed."

In that case the Court held that the judgment against a
134½ sheriff, or one against an assessor, enjoining them from assessing property did not bind the county, but the fiscal court had control of the county affairs. The Board of Assessment and Valuation did not have control of the fiscal affairs of Jefferson County, and in our opinion the judgment did not bind Jefferson County. It was the duty of the Bank of Kentucky to pay its taxes to Jefferson County, and these taxes were to be paid, not under the Hewitt law, because that denied Jefferson County to collect taxes from the Bank of Kentucky for county purposes, but under the

Constitution and revenue law enacted pursuant to it, as held by the opinion of this Court in 102 Ky., and the Federal Court R., *supra.* Under the revenue law of 1892, the banks were required to make their reports on or before the first day of March of each year as of the 31st of December preceding. (Sec. 4092, Ky. Statutes.)

It will be seen that it was the duty of the Bank of Kentucky to make its report on or before the first day of March of each year as of the preceding 31st day of December for purposes of taxation
135 for the benefit of Jefferson County. This must be true because the revenue act of 1892 was in full force and operation in so far as the County of Jefferson and the Bank of Kentucky were concerned. It was in existence and conducting its business on the 31st day of December and also on the 31st of March, because it did not quit business until May first. Therefore it is perfectly manifest that the proceeding should be sustained so far as Jefferson County is concerned, and the bank should be required to pay the taxes in controversy.

The case presents a more difficult question in the claim which the State asserts against the Bank of Kentucky (and as against the National Bank of Kentucky, as the holder of the property which is claimed to be liable for taxation). However there is no difficulty in reaching the conclusion that if the Bank of Kentucky is liable for the taxes, there was a lien therefor upon the property transferred to the National Bank of Kentucky, and it must pay the taxes if the Bank of Kentucky is liable for them. (Board of Councilmen of Frankfort *vs.* Mason & Ford Company, 100 Ky., 54.)

It is insisted that under the Hewitt law banks were required
136 to report and pay taxes on the first of July in each year, therefore the assessment and the act of payment of the taxes occurred at the same time. The claim is then made that as the assessment did not take place until the first day of July, the Bank of Kentucky did not have any property to be assessed, and was not required to report, as it had transferred its property to the National Bank. This argument is based upon the claim that when the law provides that the assessment shall be made upon a certain day, the liability for taxes is fixed as of that date, and the person who owns or possesses the property at that time is bound for the taxes, although he may subsequently part with the property. In support of that contention the case of the Commonwealth *vs.* Riley's Curators, 25 Rep., 2006, is cited. In that case this Court approves the case of Baldwin *v.* Shine, 84 Ky., 507, quoting from it as follows:

"The assessment is made as of a certain day of each year. The liability is fixed as of that day, and the owner or possessor of
137 the property upon that day is bound for the taxes, although he may subsequently part with it."

We will consider this question from two points of view. In the first place the revenue act 1892 was a valid act. The Bank of Kentucky only escaped the payment of taxes under its provisions by being fortunate enough to be placed in a position to invoke the doctrine of *res judicata,* which was the result of an erroneous opinion

in holding that it had an irrevokable contract with the State under the Hewitt law.

Every substantial right which the bank acquired by reason of this adjudication under the Hewitt law, must and should be respected. The act of 1892, which repealed the Hewitt law, provided that banks should make reports on or before the first day of March of each year, as of the date of the preceeding 31st day of December. This part of the law fixed the time when the report should be made and the assessment of the property should take place. If the irrevokable contract claimed by the Bank of Kentucky did not operate to deprive the General Assembly of the right to fix the date when the report should be made and the property should be assessed,
138 then the provisions of the act of 1892 with reference thereto are in force, and the bank should have made report on the first of March as of date of the preceding 31st of December. If this be true, then the Bank of Kentucky was the owner of the property of the date of assessment and liable for the taxes before it made the transfer to the National Bank of Kentucky. We are of opinion that the irrevocable contract established by appellant did not operate so as to make inoperative the provisions of the act of 1892, with reference to the date of assessment of its property.

The only right which it secured was to pay taxes upon the property as designated by the Hewitt act. When the right to do this is maintained, every right it had under its irrevocable contract has been respected.

If under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year, for which the assessment was made and the taxes were paid. The act does not
139 say that the assessment shall take place on July 1st, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that day. The Hewitt law provides that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for the taxes thereon. (Hewitt Law, Sec. 6, Art. 1, Gen. Stats. Ed., 1888, page 1035.)

Under the Hewitt law September 15th was assessment day. Under the Section of the Hewitt law to which reference has just been made, the Bank of Kentucky became liable for taxes on the 15th of September of the fiscal year for which these taxes are claimed to be due, and under the law a lien existed upon the property to secure their payment, and when the National Bank of Kentucky received the property it did so with a lien for taxes upon it. The last views expressed are upon the assumption that the bank did not have to report on the first of March as of date of the preceding 31st of December. If the revenue act in this respect was not in force, then the provi-
140 sions of the Hewitt law were, and as we have shown, by the terms of that law the property transferred to the National Bank of Kentucky was encumbered with a lien for the taxes in question.

The judgment is affirmed.

141 Be it remembered that on said day there was filed in the Clerk's — of the Court of Appeals of Kentucky an Assignment of Errors, and which original Assignment of Errors is attached hereto as follows:

142 Supreme Court of the United States.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, and EDWIN W. HAYS, Plaintiffs in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Writ of Error to the Court of Appeals of the State of Kentucky.

Assignments of Error.

Plaintiffs in Error, Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays, by Alexander Pope Humphrey, their attorney, this August 2, 1906, show that in the record of proceedings in the above entitled cause there is manifest error, in this, to wit:

1. The said Court of Appeals of Kentucky erred in failing to give to the judgment of the Circuit Court of the United States for the District of Kentucky, set forth in their answer herein, that due force, effect and credit to which it was and is entitled.

2. The said court erred in failing to hold that the said judgment hereinbefore referred to was a complete and absolute bar to the proceedings herein and to any claim of the defendant in error herein.

3. The said court erred in holding that any judgment should be rendered against the National Bank of Kentucky on account of any claim for taxes on property acquired by it of the Bank of Kentucky.

4. The said court erred in holding that the assets acquired by the National Bank of Kentucky were subject to assessment for state or county taxes.

5. The said court erred in holding that there was any lien
143 on any of the assets of the Bank of Kentucky for state or county taxes when said assets were acquired by the National Bank of Kentucky.

6. The said court erred in holding that the Bank of Kentucky, or the National Bank of Kentucky, was required to make any report under the revenue law of Kentucky of 1892 prior to May 1, 1902.

7. The said court erred in holding that the Bank of Kentucky or the National Bank of Kentucky was in any way assessable for county taxes or state taxes for the years 1898-1899, or 1899-1900.

8. The said court erred in failing to hold that the contract of the Bank of Kentucky with appellee as set forth and described in the judgment aforesaid, was a full and complete defense to the claim of appellee herein.

9. The said court erred in rendering judgment against either of the plaintiffs in error.

Wherefore the plaintiffs in error pray that the judgment of the said Court of Appeals of Kentucky may be reversed by this Honorable Court and this cause remanded to the said Court of Appeals with directions to send down its mandate to the Jefferson Circuit Court, directing it to dismiss the petition against the plaintiffs in error.

ALEXANDER POPE HUMPHREY,
Counsel for Pl'ffs in Error.

Aug. 3, 1906.

143½ [Endorsed:] Supreme Court of the United States. Bank of Kentucky, &c. *vs.* Commonwealth of Kentucky. Writ of error to the court of appeals of Kentucky. Assignments of error. Filed Aug. 4 1906. J. Morgan Chinn C. Ct.

144 Be it remembered that on the fourth day of August A. D. 1906 there was filed in the Clerk's office of the Court of Appeals of Kentucky, a writ of Error from the United States Supreme Court to the Court of Appeals of the State of Kentucky, and which original writ of error is attached hereto as follows—

145 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays, Appellants and the Commonwealth of Kentucky, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of the statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error

146 hath happened, to the great damage of the said Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties *a-* aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same at Washington on the 30th day of August, 1906, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 1st day of August A. D. 1906, and of the Independence of the United States of America the 131st year.

[Seal 6th Circuit Court Eastern Ky. Dis. U. S. of America.]

WALTER G. CHAPMAN,
Clerk United States Circuit Court for the Eastern Judicial District of Kentucky, at Frankfort.

Allowed by,
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

146½ [Endorsed:] Bank of Kentucky, *et al.*, Plaintiffs in Error, *vs.* Commonwealth of Kentucky, Defendant in Error. Writ of Error. Filed Aug. 4 1906. J. Morgan Chinn C. Ct.

147 Be it remembered that on said day there was filed in the Clerk's office of the Court of Appeals of Kentucky a writ of error bond and which is in words and figures as follows towit:

Court of Appeals of Kentucky.

BANK OF KENTUCKY, NATIONAL BANK OF KENTUCKY, OSCAR FENLEY, and EDWIN W. HAYS, Plaintiffs in Error
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Bond.

Know all men by these presents, that we the Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays as principals, and J. William Gaulbert and Alex. P. Humphrey as sureties, are held and firmly bound unto the Commonwealth of Kentucky, its successord and assigns, in the sum of Thirty Thousand ($30,000.00) Dollars, for the payment of which well and truly to be made, we Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays, for ourselves, our successors, heirs executors and administrators, and the said J. William Gaulbert and Alex P. Humphrey, our heirs, executors and administrators, bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this August 2nd 1906.

The condition of this obligation is such that, whereas the said Commonwealth of Kentucky instituted a certain action against the

said Bank of Kentucky, National Bank of Kentucky, Oscar
148 Fenley, and Edwin W. Hays, in the Jefferson County Court, claiming a certain sum of money and obtained judgment therefor, and subsequently an appeal was taken from said judgment to the Jeffe-son Circuit Court, which affirmed the same, and subsequently an appeal was taken from that judgment to the Court of Appeals of Kentucky, which affirmed the same, and whereas the said Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays have sued out a writ of error from the Supreme Court of the United States to reverse said judgment of the Court of Appeals of Kentucky.

Now therefore, if the above bounden Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays shall prosecute said writ of error to effect and answer all damage and costs if it fail to make good this appeal, then this obligation shall be void, otherwise remain in full force and effect.

BANK OF KENTUCKY,
By ALEX P. HUMPHREY.

Attest. L. R. WARREN.

NATIONAL BANK OF KENTUCKY,
By ALEX P. HUMPHREY.

Attest. L. R. WARREN.

OSCAR FENLEY.

Attest. L. R. WARREN.

EDWIN W. HAYS.

Attest. PRESTON DAVIE.

J. WILLIAM GAULBERT.

Attest. L. R. WARREN.

ALEX P. HUMPHREY.

Attest. L. R. WARREN.

The above and foregoing bond is approved, this August 3rd 1906.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

149 And on said date there was filed in the Clerk's office of the Court of Appeals of Kentucky, the original Citation, with proof of service endorsed thereon, and which is attached hereto as follows—

150 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of the State of Kentucky, wherein the Bank of Kentucky, National Bank of Kentucky, Oscar Fenley and Edwin W. Hays are plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John P. Hobson, Chief Justice of the Court of Appeals of the State of Kentucky, this August 3rd, 1906.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Citation accepted for defendant in error. This August 3, 1906.

HENRY L. STONE,
Counsel for Defendant in Error.

Filed Aug. 4 1906.
J. MORGAN CHINN, *Clk.*

151 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

I, J. Morgan Chinn Clerk of the Kentucky Court of Appeals certify that the foregoing — pages contain a true, full and complete transcript of the record and proceedings had in the case of The Bank of Kentucky etc. Appellants *v.* The Commonwealth of Kentucky Appellee upon appeal from a judgment of the Jefferson Circuit Court, Chancery Branch First Division, together with the original Writ of Error, the Original Assignment of Errors, the original Citation and proof of service and copy of the Writ of Error Bond as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at the Capitol at Frankfort, this the fourth day of August, A. D. 1906.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,347. Kentucky court of appeals. Term No. 382. Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, and Edwin W. Hays, plaintiffs in error, *vs.* The Commonwealth of Kentucky. Filed August 16, 1906. File No. 20,347.

Office Supreme Court, U. S.
FILED.
JAN 7 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. [redacted] 87.

BANK OF KENTUCKY, ET AL., - PLAINTIFFS IN ERROR,

v.

COMMONWEALTH OF KENTUCKY, - - - - - - - DEFENDANT IN ERROR.

Error to the Court of Appeals of Kentucky.

NOTICE, MOTION AND BRIEF BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

F. C. HUNSMACHER PRESS, LOUISVILLE, KY

Supreme Court of the United States

OCTOBER TERM, 1906.
No. 382.

BANK OF KENTUCKY, ET AL., - - *Plaintiffs in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

ERROR TO THE COURT OF APPEALS
OF KENTUCKY.

NOTICE.

To Messrs. Humphrey & Humphrey,
Counsel for Plaintiff in Error:

Please take notice that we shall make a motion for defendant in error in the above styled case before the court at the opening of its session on Monday, January 7, 1907, or as soon thereafter as counsel can be heard, to advance the above styled case for hearing at such time as the court may direct, and, in support of said motion, will file and present to the court at the hearing of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated December 27, 1906.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

Service of the foregoing notice is accepted this December 28, 1906.

ALEX. POPE HUMPHREY,
HUMPHREY & HUMPHREY,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 382.

BANK OF KENTUCKY, ET AL., - - *Plaintiffs in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

ERROR TO COURT OF APPEALS OF KENTUCKY.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this case for hearing on these grounds:

1. The State or Commonwealth of Kentucky is a party, being the defendant in error. (Sec. 949, U. S. Compiled Statutes).

2. The execution of the revenue laws of the State of Kentucky has been stayed by the supersedeas bond executed by the plaintiffs in error herein, under which laws the plaintiff in error, Bank of Kentucky, and the property transferred by it to the plaintiff in error, National Bank of Kentucky, are liable, according to the judgment of the Court of Appeals of Kentucky, to taxes due the State of Kentucky for the year 1900, and taxes due the County of Jefferson in said State for the years 1899 and 1900, amounting to about $25,000. (Ib.; Act June 30, 1870; 29 Ky. Law Rep. 643; 94 S. W. 620).

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 382.

BANK OF KENTUCKY, ET AL., - - *Plaintiffs in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

ERROR TO COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO ADVANCE FOR HEARING.

The writ of error issued in this case to the Court of Appeals of Kentucky to review a judgment of that Court holding that the plaintiff in error, Bank of Kentucky, and the property transferred by it to the plaintiff in error, National Bank of Kentucky, were liable to assessment for taxes due the State of Kentucky for the fiscal year ending June 30, 1900, and for taxes due the County of Jefferson, in said State, for the fiscal years ending June 30, 1899, and June 30, 1900.

This proceeding was instituted January 13, 1903, by the filing of a statement in the County Court of Jefferson County, Kentucky, in the name of the Commonwealth of Kentucky, by T. C. Albritton, Revenue Agent for the

State at large, against the Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, President, and E. W. Hays, Cashier of said banks, under section 4241, Kentucky Statutes, by the provisions of which it is made the duty of such agent

> "to cause to be listed for taxation all property omitted, or any portion of property omitted, by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years;"

and the same section further provides:

> "If it shall appear to the court that the property is *liable* for taxation and *has not been assessed,* the court shall enter an order, fixing the value thereof at its fair cash value, estimated as is required by law."

In this statement it was claimed that the Bank of Kentucky, a bank organized under the laws of the State, had not been assessed upon its franchise by the Board of Valuation and Assessment as of September 15, 1898, for the year ending June 30, 1899, nor as of September 15, 1899, for the year ending June 30, 1900, for taxes imposed by the *County of Jefferson,* wherein said bank was located. It is also claimed that said bank was not assessed as of September 15, 1899, or any other date for State taxes for the year ending June 30, 1900. For 1899, the county tax was 17 cents, and for 1900 15 cents, on the $100. For 1900 the State tax was 47½ cents on the $100.

In the answer said bank admitted its franchise or property had not been assessed for county taxes for 1899

and 1900, or for State taxes for 1900, and pleaded *res judicata* founded upon certain adjudications in cases to which the County of Jefferson was not a party or privy. The adjudications relied on by said bank were the judgment of the Circuit Court of the United States for the District of Kentucky (*Bank of Kentucky vs. Stone, et al.*, 88 *Fed.* 383) and the judgment of this court affirming that judgment May 15, 1899, on appeal by a divided court (*Stone, Auditor, etc. vs. Bank of Kentucky and City of Louisville vs. same*, 174 *U. S.* 799).

The Bank of Kentucky under these adjudications, to which the members of the Board of Valuation and Assessment, and the City of Louisville alone were parties, was adjudged to be entitled to pay taxes to the State in accordance with what was known as the Hewitt Act of May 17, 1886, that is, 75 cents on each share of its capital stock equal to $100, and on so much of its surplus, undivided profits, or undivided accumulations as exceeded ten (10) per cent. of its capital stock, the same rate of taxation as was assessed upon real estate, which State tax was required to be paid on the certified report of the bank's cashier to the auditor of public accounts, and was *due* and *payable* on July 1st of each year for the preceding fiscal year ending on June 30. Such State tax was to be in lieu of all other taxation. Said bank made no report and paid no State tax for the fiscal year ending June 30, 1900, in accordance with these adjudications or the provisions of the Hewitt Act, claiming it was not bound to do so, since it had become nationalized, ceased to do business, and transferred all its property and assets on May 1, 1900, to the National Bank of Kentucky, its successor.

The Jefferson County Court, the Jefferson Circuit Court and Court of Appeals of Kentucky, all held these contentions were unavailing; that is to say (1) said bank's plea of *res judicata* was not good against the County of Jefferson, which was not a party or privy to the suits in the federal courts (*County of Henderson vs. Henderson Bridge Co.*, 25 *Ky. Law Rep.* 421, 75 *S. W.* 239; *Joyes vs. Jefferson County Fiscal Court,* 106 *Ky.* 615; *Northern Bank of Kentucky. vs. Stone,* 88 *Fed.* 413; *Farmers' Bank of Ky. vs. Stone,* 174 *U. S.* 409); and (2) that it was not good against the State because said bank, as is admitted, had paid no State taxes at all for 1900, as provided in the Hewitt Act, or in accordance with said federal court adjudications, or otherwise, and that the property and assets, which had been transferred on May 1, 1900, to its successor, the National Bank of Kentucky, were then under lien for State taxes for that year, and could not escape the burden imposed thereon by law.

By the plan of reorganizing as a national bank, the Bank of Kentucky sought to avoid paying any State taxes for a whole year, even as provided in the Hewitt Act. The last payment made by it for State taxes was made on July 1, 1899, for the preceding fiscal year ending June 30, 1899, and the first payment for State taxes made by the National Bank of Kentucky was made for the fiscal year ending June 30, 1901.

Under the Hewitt Act a refusal or failure to pay State taxes, as therein provided, imposed the duty on the Bank of Kentucky to pay the same taxes, State, County and municipal, on its shares, surplus, undivided profits, and undivided accumulations as were levied upon the assessed taxable property in the hands of individuals. In other

words, under the adjudications of the federal courts, the State is claiming herein only what it is entitled to by reason of the refusal or failure of the Bank of Kentucky to pay its State taxes for 1900.

The federal question to be determined on this writ of error is whether or not the Court of Appeals of Kentucky in its judgment (29 *Ky. Law Rep.* 643, 94 *S. W.* 620) gave due effect to the judgments of the courts of the United States pleaded by plaintiffs in error as *res judicata.* For the defendant in error it is claimed that due effect has been given to said adjudications of the federal courts by the judgment herein of the Court of Appeals of Kentucky, which, so far as State taxes for 1900 are concerned, simply enforces the alleged contract between the State and the Bank of Kentucky, growing out of the provisions of the Hewitt Act. Furthermore, the defendant in error claims the adjudications aforesaid of the federal courts do not conclude the rights of the County of Jefferson, and its claims for taxes for the years 1899 and 1900 are not *res judicata,* because it was not a party or privy thereto.

The County Court of Jefferson County assessed the franchise or intangible property of the Bank of Kentucky at $2,500,000 for county taxation, for each of the years 1899 and 1900, after deducting $200,000 as the value of the capital stock of said bank in its branch bank located in the City of Frankfort, Franklin County, Kentucky; and assessed the franchise or intangible property of said bank at $2,700,000 for State taxation for the year 1900.

On an appeal by said bank to the Circuit Court of Jefferson County, the judgment of the County Court of December 29, 1903, holding said bank liable for county

and State taxes on these assessed values was affirmed April 2, 1904, and on the appeal of said bank to the Court of Appeals of Kentucky, the judgment of the Circuit Court was affirmed June 12, 1906. At the date of the County Court's judgment (December 29, 1903) the aggregate amount of the State and county taxes, with the statutory penalty included, was $24,990.

This proceeding has been in the courts already almost four (4) years, while the county taxes for 1899 have been due over seven (7) years, and the county and State taxes for 1900 have been due over six (6) years. By a supersedeas bond the plaintiffs in error have stayed the execution of the revenue laws of the State of Kentucky as construed and applied by the courts of that State. Under Section 949, U. S. Compiled Statutes, Act of June 30, 1870, it is claimed that this case should be advanced for hearing in this court upon the grounds set forth in the motion of the defendant in error made for that purpose.

All of which is respectfully submitted.

HENRY L. STONE,
SAMUEL B. KIRBY,
ROBERT W. BINGHAM,
Counsel for Defendant in Error.

Office Supreme Court
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JAMES H. McKE

No. 87.

Supreme Court of the United States

OCTOBER TERM, 1907.

BANK OF KENTUCKY, &c., . . *Plaintiffs in Error,*

versus

THE COMMONWEALTH OF KENTUCKY, ... *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

ALEXANDER P. HUMPHREY,
Counsel.

John P. Morton & Company, Louisville, Ky.

Supreme Court of the United States.

BANK OF KENTUCKY, ETC., ...*Plaintiffs in Error,*

vs. ARGUMENT FOR PLAINTIFFS IN ERROR.

THE COMMONWEALTH OF KENTUCKY. .*Defendant in Error.*

STATEMENT.

This is a proceeding taken under the Statutes of Kentucky, by an officer called a revenue agent, to obtain the assessment for taxation of certain property belonging at the time of the proceeding to the National Bank of Kentucky. The court of first instance, the Jefferson County Court, directed the assessment to be made, and found the amount of tax due under such assessment. An appeal was taken from this judgment to the Jefferson Circuit Court, where the judgment was affirmed. An appeal was then taken from the Jefferson Circuit Court to the Court of Appeals of Kentucky, which resulted also in an affirmance. From this judgment a writ of error was taken and the record brought to this court.

It appears from the record that the Bank of Kentucky was a corporation chartered by the Legislature of Kentucky in the year 1834. Its charter life was subsequently twice extended. By an act approved March 22, 1900, the charter of the Bank of Kentucky was repealed as of May 1, 1900. On that day the National Bank of Kentucky was organized and took over the assets of the State bank. These proceedings are based upon the claim that the assets of the Bank of Kentucky were subject to

assessment for taxes for Jefferson County for the years 1898-1899 and 1899-1900, and for the State for the year 1899-1900.

The Commonwealth brought this proceeding in the Jefferson County Court, on January 13, 1903, through T. C. Albritton, Revenue Agent, making parties defendant the Bank of Kentucky, the National Bank of Kentucky, Oscar Fenley, who was President of the Bank of Kentucky, and then became President of the National Bank of Kentucky, and Edwin W. Hays, who was Cashier of the Bank of Kentucky and then became Cashier of the National Bank of Kentucky.

The defendants insisted that there was no liability at all, because in a prior suit in the Circuit Court of the United States a judgment had been rendered, establishing the inviolability of a contract between the Bank of Kentucky and the Commonwealth of Kentucky under what is known as the Hewitt Act, and that this judgment of the Circuit Court of the United States foreclosed the present controversy.

It was again insisted that the National Bank of Kentucky could not be taxed upon its assets without a violation of the Federal Statute.

ASSIGNMENTS OF ERROR.

1. The said Court of Appeals of Kentucky erred in failing to give to the judgment of the Circuit Court of the United States for the District of Kentucky, set forth in their answer herein, that due force, effect and credit to which it was and is entitled.

2. The said court erred in failing to hold that the said judgment hereinbefore referred to was a complete and absolute bar to the proceedings herein and to any claim of the defendant in error herein.

3. The said court erred in holding that any judgment should be rendered against the National Bank of Kentucky on account of any claim for taxes on property acquired by it of the Bank of Kentucky.

4. The said court erred in holding that the assets acquired by the National Bank of Kentucky were subject to assessment for State or County taxes.

5. The said court erred in holding that there was any lien on any of the assets of the Bank of Kentucky for State or County taxes when said assets were acquired by the National Bank of Kentucky.

6. The said court erred in holding that the Bank of Kentucky, or the National Bank of Kentucky, was required to make any report under the revenue law of Kentucky of 1892, prior to May 1, 1902.

7. The said court erred in holding that the Bank of Kentucky, or the National Bank of Kentucky, was in any way assessable for county taxes or State taxes for the years 1898-1899 or 1899-1900.

8. The said court erred in failing to hold that the contract of the Bank of Kentucky with appellee, as set forth and described in the judgment aforesaid, was a full and complete defense to the claim of appellee herein.

9. The said court erred in rendering judgment against either of the plaintiffs in error.

ARGUMENT.

By the charter of the Bank of Kentucky as originally passed, it was provided that a tax of 25 cents should be paid by the Bank on each share of stock—this to be in lieu of all other taxation, general or local, but with the right in the State to increase this to 50 cents. The charter life of the corporation was thirty years. It was extended twice, by acts of the Kentucky Legislature. In 1886 what is known as the Hewitt Law was enacted (V. App.). At the time of the passage of this act the Bank of Kentucky was paying 50 cents a share upon its capital stock, in lieu of all other taxation, general or local, but the State was asserting the claim that while the Bank might have had a contract protecting it in this commutation of its taxes, this contract was subject to alteration or repeal by the Legislature by reason of the fact that the charter life of the Bank had been extended, and that such extension had taken place subsequent to the passage of what is known in Kentucky as the Act of 1856. This act reserved a power in the Legislature to repeal all laws passed subsequent to its date unless a contrary intent was expressed in such law. The Hewitt Law, above spoken of, provided that the banks in the Commonwealth should pay to the State 75 cents on each share of capital stock outstanding, and the ordinary rate of State taxation on the amount of its surplus and undivided profits less 10 per cent thereof. It was provided that this should be in lieu of all local taxation except upon the real estate occupied by the bank for the purposes of the insti-

tution. The Hewitt Act further provided that any bank chartered prior to its passage might accept the terms of the law by a resolution of its stockholders, and, failing in this, should be taxed for the State as other corporations were taxed, and also should be taxed by the local communities in which it did business. The Bank of Kentucky accepted the provisions of the Hewitt Law, and made the reports and paid the taxes required by its terms.

In 1891 Kentucky adopted a new Constitution and provided that all property of individuals and corporations should be taxed according to its value.

In 1892 the Legislature passed a general revenue bill. By the terms of this bill certain corporations—among others, banks—were required to make a return to the Auditor of Public Accounts, to be by him laid before what is known as the State Board of Valuation and Assessment. It was the duty of this Board to determine the value of what is denominated the franchise of the corporation. The value of its franchise was arrived at by ascertaining the total value of the capital stock of the corporation and deducting therefrom the value of its tangible property, which had been assessed by the local assessor. The difference between these two was denominated the franchise. Included in this so-called franchise was the value of all stocks, bonds and choses in action of the corporation. In other words, such property as this—stocks, bonds and choses in action—was regarded as intangible property. (See 4020 in App.)

This so-called franchise tax has been repeatedly decided by the Court of Appeals of Kentucky and by this Court to be a property tax. Henderson Bridge Co. v. Kentucky, 166 U. S. 150.

In Commonwealth v. Cumberland Telephone & Telegraph Co., 99 S. W., 604 (S. C., 30 K. L. R., 723), the Court of Appeals of Kentucky expressly held that cash, stocks, bonds, securities and other choses in action of the defendant, the Cumberland Telephone & Telegraph Company, were not subject to assessment by the local assessor, but were to be included in the valuation of the franchise of the company by the State Board of Valuation and Assessment.

This is fully explained, as to the assessment of banks by the Board of Valuation and Assessment, in Marion National Bank v. Burton, Sheriff, 28 K. L. R., 864 (S. C., 90 S. W., 944).

By this act of 1892 all property of individuals and the tangible property of corporations other than railroads is assessed by the local assessor as of September 15.

The intangible property of corporations not required to report to the Auditor is also assessed as of September 15. (Section 4052, Ky. Stat. in App.)

By Section 4096 it is provided that the tangible property of railroads be assessed as of July 1. (V. App.)

Section 4077 provides what corporations are to be liable to the so-called franchise tax. (V. App.) All of these corporations report their property as of September 15, except banks.

By Section 4092 (V. App.) banks are required to make their reports on or before March 1, as of the 31st day of the preceding December.

By Section 4077 it is provided that corporations whose franchises are to be assessed shall pay annually a tax on such franchises to the State, and a local tax thereon to the county, incorporated city, town and taxing district where the franchise may be exercised.

Under Section 4096 and subsequent sections the Railroad Commission fixes the value of the tangible property of railroads. When such tangible value has been fixed it is the duty of the Auditor to apportion such value for local taxation among the counties, towns and taxing districts, including school districts, where such tangible property may be situated. (Section 4102, App.) In like manner, when the State Board of Valuation and Assessment has fixed the franchise of the corporation, it is the duty of the Auditor to certify to the county clerks of the counties the proportion of the corporate franchise liable to local taxation, and the distribution thereof among the cities, towns and taxing districts, including school districts, to the end that local taxes may be levied thereon. (See 4084, App.)

On February 21, 1898, the Bank of Kentucky found that the State Board of Valuation and Assessment was attempting, notwithstanding the contract which it claimed to have made under the Hewitt Law, to assess its cash, stocks, bonds and securities for State taxation and to certify the same to the taxing districts wherein it carried on its business. These taxing districts were the

County of Jefferson, for taxation by the City of Louisville, and the County of Franklin, for taxation by that county and by the City of Frankfort. It thereupon filed its bill of complaint in the Circuit Court of the United States, making parties defendant the members of the State Board of Valuation and Assessment, the City of Louisville, the County of Franklin and the City of Frankfort. It set up its claim to a contract under the Hewitt Law. It prayed that the State Board of Valuation and Assessment should be enjoined from making any assessment under the Act of 1892, or from certifying the same to the County of Jefferson or to the County of Franklin. It also prayed that the City of Louisville, County of Franklin and the City of Frankfort should be enjoined from endeavoring to collect any taxes upon assessments already made and apportioned. The County of Jefferson was not made a party defendant to this suit because at the time the suit was filed it was believed to be the law, and it was certainly the practice of the County of Jefferson not to levy any taxes upon property within the boundaries of the City of Louisville. There was, therefore, no threat upon the part of the County of Jefferson to collect any taxes against the Bank of Kentucky. But the bill prayed for the establishment of the contract with the Bank under the Hewitt Law, and an injunction against the State Board of Valuation and Assessment not only for the years named in the bill but for all future years. A decree was rendered in favor of the Bank, and this decree was affirmed by this Court by an equal division of its members. The terms of this decree will be more particularly set out hereafter.

The Hewitt Law (App.) provides that the bank whose stock is taxed shall, on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of surplus, undivided profits or undivided accumulations, and how and in what said surplus or undivided profits is invested, and pay into the treasury the amount of tax due. It will thus be seen that under the Hewitt Law the condition of the bank—that is, what is its authorized capital stock and what are its assets—is ascertained as of July 1, and the tax paid thereon.

As stated above, on March 22, 1900, the Legislature passed an act repealing the charter of the Bank of Kentucky. This act, in full, is as follows:

> "Whereas, by virtue of a recent decision of the Supreme Court of the United States, all banks of this State, both State and National, are now required to pay State and local taxes in Kentucky, except the Bank of Kentucky, the Farmers Bank of Kentucky and the Deposit Bank of Frankfort, which three last named banks, by virtue of said decision, are now claiming exemption from all State and local taxes, except as provided in the Hewitt law, during their corporate existence, therefore,
>
> "Be it enacted by the General Assembly of the Commonwealth of Kentucky:
>
> "1. That an act, entitled 'An Act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof; also an act entitled 'An Act to incorporate the Farmers Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof; also an act entitled, 'An Act to incor-

porate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed. Provided, that if said banks or either of them, on or before May 1st, nineteen hundred, file in the Secretary of State's office their or its written consent to pay taxes under State and local levies of nineteen hundred and subsequent years, as provided in the Constitution and Revenue Statutes of this State, the bank or banks thus agreeing shall be excepted from the operation of this act."

The Bank of Kentucky did not file the consent, but, as stated above, the National Bank of Kentucky was formed on May 1, 1900, and all of the assets of the Bank of Kentucky transferred to it.

It is insisted in this case that as the Bank of Kentucky did not, on July 1, 1900—two months after it had ceased to exist, by act of the Legislature—make a report under the Hewitt Law, for the year 1899-1900, it must be assessed as other banks were assessed; and it is further insisted that as Jefferson county was not a party to the litigation in which the judgment in favor of the Bank was rendered by the Federal Court, the Bank must pay county taxes for the years 1898-1899 and 1899-1900. We shall discuss these in their order.

THERE IS NO LIABILITY TO STATE FOR TAXES FOR YEAR 1899-1900.

We give in full paragraphs 2, 3 and 4 of the answer of the defendants in the County Court. Demurrer was sustained to all three of these paragraphs:

> "2. Further answering, these defendants say that the said Bank of Kentucky was created a body politic and corporate by the Act of the General Assembly of Kentucky, approved February 2, 1834; that the said corporation was duly organized under the terms of the said Act of Incorporation. By its original charter it was provided that it should continue a body politic and corporate until October 1, 1864.
>
> "By two Acts of the General Assembly of Kentucky, one approved February 15, 1858, and one approved February 1, 1872, the charter life of the said Bank of Kentucky was so extended as not to expire until October 1, 1909; by the 15th section of the original charter it was provided that the cashier of the said Bank of Kentucky should pay to the Treasurer of the Commonwealth, twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the Legislature might increase or diminish the same, but at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank.
>
> "By an act approved February 12, 1836, the Legislature exercised the right reserved and imposed the tax of fifty cents upon each share of said stock of the Bank of Kentucky.
>
> "By an act approved May 17, 1886, entitled 'An Act to amend the Revenue Laws of the Commonwealth of Kentucky,' commonly known as the Hewitt Law, it was provided that the cashier of all State

and National Banks should annually, on the first day of July, make a report of their condition to the Auditor and pay into the State treasury seventy-five cents on each share of their capital stock, and in addition, pay into said treasury, on their surplus, undivided profit and accumulations in excess of ten per cent of their capital stock, a tax at the same rate as real property should be assessed. And it was provided by said act that the said taxation should be in full of all taxation—State, county and municipal—except that the real estate and buildings owned or used by the bank in conducting their business should not be exempt from taxation for municipal or county purposes; that such real estate alone might be taxed for county and municipal purposes as other real estate was taxed.

"As a condition to its operation the said Act, in the 4th section thereof, provided for a certain consent to be given by the stockholders of the said bank. This consent was given strictly in accordance with the said law by the stockholders of the Bank of Kentucky, on June 25, 1887.

"The said Bank of Kentucky made the report under said Act and paid the taxes thereunder for every year from July 1, 1886, to July 1, 1899, both inclusive, and besides paid all the municipal and county taxes upon its real estate required to be paid by the said Act.

"By an act approved March 22, 1900, it was provided, among other things, that 'An Act to establish the Bank of Kentucky, approved February 16, 1834, and all amendments and extensions thereof, be and the same are hereby repealed.'

"There was an emergency clause to the said Act and the same took effect and was in force from and after its passage. There was a proviso in said Act that if the said Bank of Kentucky, on or before May 1, 1900, should file in the office of the Secretary of State its written consent to pay taxes under State and local levies of 1900 and subsequent years, as

provided in the Constitution and Revenue Statutes of the State, the act should not go into effect as to said bank.

"No such consent was filed, and thereupon and thereby the said Bank of Kentucky ceased to exist on May 1, 1900.

"And so it is that on the 1st day of July, 1900, the date at which the statement of the Commonwealth claims a report should have been made under the Hewitt Law, the said Bank of Kentucky had, for more than two months, ceased to exist.

"The defendants further state that on May 1, 1900, the defendant, the National Bank of Kentucky, was organized and began its charter life under the laws of the United States, particularly that body of statutes styled the National Bank Act, and acquired, by due process of law, all the assets of the said Bank of Kentucky, without any lien whatsoever upon them for any State or county taxes, and especially without any lien thereon for any of the State or county taxes attempted to be assessed by this proceeding.

"And the defendants plead and rely upon said National Bank Act and the laws of the United States as a full defense against any claim the petitioner may make herein, either for the said taxes or for any of them, or for any penalty thereon.

"3. Further answering, the defendants say that heretofore, to-wit, on February 21, 1898, the defendant, Bank of Kentucky—sometimes styled President, Directors and Company of the Bank of Kentucky—filed its bill of complaint in the Circuit Court of the United States for the District of Kentucky, sitting at Louisville, wherein it impleaded Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort, all of whom were duly served with process and entered their appearance and defended the said action.

"The said bill of complaint showed and pleaded in apt terms that the controversy presented therein between the complainant and the defendant was one within the jurisdiction of the said court, viz., one arising under the Constitution and laws of the United States, and involving an amount greater than $20,000.

"In the said bill of complaint it was alleged substantially as follows: That the complainant was a corporation duly created by and organized under the laws of the State of Kentucky, its original charter having been granted February 22, 1834, to continue for thirty years, and its charter life having been extended by two acts—one approved May 10, 1858, and the other approved February 1, 1872; that said charter life would not expire until February 1, 1909.

"The defendant, Samuel H. Stone, was impleaded as the Auditor of Public Accounts of the State of Kentucky; the defendant, Charles Finley, as the Secretary of State of the State of Kentucky, and the defendant, George W. Long, as the Treasurer of the State of Kentucky; the defendant, City of Louisville, as a municipal corporation; the County of Franklin as a municipal corporation; and the Board of Councilmen of the City of Frankfort as a municipal corporation.

"The said bill of complaint set forth the incorporation of the complainant and the extension of its corporate life. It further states that provision of its original charter in regard to taxation, and subsequent acts in relation thereto, and what had been the settled course of decision of the highest court of Kentucky as to the amending of these provisions. It further sets forth the passage, on March 18, 1886, of an act commonly called the Hewitt Law, and of the acceptance by the complainant of its terms and of the reports by the complainant thereunder, and the payment of tax thereunder. It further recites the passage by the Legislature of Kentucky of the Act of November 11, 1892, wherein it was provided

that banks should file certain reports on or before March 1st of each year, such reports to show the condition of the said banks as of the 31st day of the preceding December, and the duty of the said Auditor, Secretary of State and Treasurer to make an assessment under the said reports.

"The bill of complaint further stated the amount of its capital stock as of the 31st day of December, 1894, 1895 and 1896, and the amount of its surplus; also what had been fixed by the three officers composing the State Board of Valuation and Assessment as its capital and surplus on December 31, 1893, December 31, 1894, December 31, 1895, December 31, 1896, and the apportionment that they had attempted to make between the municipal corporations of the amount of such assessment.

"The complainant set forth that this scheme of taxation under the Act of November 11, 1892, had violated the contract made between the complainant and the State under the Hewitt Law, and that it was also violative of the Constitution of the State of Kentucky and of the Constitution of the United States.

"The complainant also set forth various litigation which it had theretofore conducted, in which the complainant insisted that it had been adjudged that it would not be taxed otherwise than under the Hewitt Law.

"The complainant further alleged that the defendants, the officers named, would proceed to value the franchise of the complainant in the manner set forth in the Act of November 11, 1892, for the years 1895, 1896 and 1897 and certify such value to the County Clerk of Jefferson County, and that these assessments would be illegal.

"The said bill of complaint contained the following prayer: 'The premises considered, complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of complainant's

capital stock under the said Act of November 11, 1892, for the years 1895, 1896 and 1897, or any other years, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said several municipalities, and that the said several municipalities, the City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments under the Hewitt Law or under its charter, no other or further taxes shall be exacted from it under any form or by any authority.'

"Defendants further say that as aforesaid all of the defendants answered the said bill of complaint. Issue having been joined, the said cause came on to be finally heard, and on June 4, 1898, the following order was entered:

" 'It is ordered by the Court that the preliminary injunction heretofore granted in the foregoing case be and the same is hereby continued until the 25th day of June, 1898.'

"And on June 25, 1898, the following decree was entered:

" 'The Court, being advised, filed its opinion herein. It is therefore adjudged, ordered and decreed as follows:

" '1. The demurrer of the defendant, The City of Louisville, to the bill of complaint is hereby overruled; to which the said City of Louisville excepts.

" '2. The demurrer of the Board of Councilmen of the City of Frankfort to the bill of complaint is overruled; to which the said defendant excepts.

" '3. The demurrer of the County of Franklin to the bill of complaint is overruled; to which the said defendant excepts.

"'4. The demurrer of the defendants, Samuel H. Stone, Geo. W. Long and Charles Finley, to the bill of complaint is overruled; to which the defendants except.

"'5. The plea of the Board of Councilmen of the City of Frankfort and the County of Franklin, defendants, to the bill of complaint is overruled; to which the said defendants except.

"'The defendants, The County of Franklin and the City of Frankfort, offered to file an amended answer, to which complainant objected, and the motion to file is overruled; to which defendants except, and the amended answer is made a part of the record by this order.

"'6. And thereupon came the complainant, by Humphrey & Davie, counsel, and filed herein replication to the answers of the City of Louisville and the Board of Councilmen of the City of Frankfort and the County of Franklin.'

"And by consent this cause came on to be heard for final decree.

"The complainant read upon the hearing its bill of complaint and its amended bill of complaint herein and several exhibits filed herein, viz.:

"Exhibit No. 1, being the record of the proceeding in the case of The Bank of Kentucky vs. The Franklin County Court and J. W. Gaines, Sheriff.

"Exhibit No. 2, being the record of the proceedings in the case of Bank of Kentucky vs. City of Frankfort.

"Exhibit No. 3, also called in the bill Exhibit A, being the resolutions of the stockholders of the complainant accepting the Hewitt Bill. It is agreed that these resolutions were filed in due time and in accordance with law.

"Exhibit No. 4, also called in the bill Exhibit B, being a record of the proceedings in the case of the Bank of Kentucky vs. Armstrong, Sheriff, and the Franklin County Court.

"Exhibit No. 5, also called in the bill Exhibit C, being the final judgment of the Franklin Circuit Court in the last named cause.

"Exhibit No. 6, being the record of the proceedings in the case of the Bank of Kentucky vs. City of Frankfort.

"Exhibit No. 7, also called in the bill Exhibit D, being the final judgment of the Franklin Circuit Court, entered in pursuance of the mandate of the last named cause.

"Exhibit No. 8, also called in the bill Exhibit E, being the record of the proceedings in the case of the Bank of Kentucky vs. R. H. Thompson, etc.

"The defendant, the County of Franklin, read on hearing its answer, and the defendant, the City of Frankfort, read on hearing record of proceedings in the case of Board of Councilmen of the City of Frankfort vs. L. C. Norman, Auditor, etc., being called in the record Exhibit 9, and the defendant, the City of Louisville, read its answer and the stipulation between the complainant and the defendant, City of Louisville, filed herein June 25, 1898, together with the ordinances and special statutes herein mentioned and referred to, and it is now adjudged, ordered and decreed that the defendants, Samuel H. Stone, Charles Finley and Geo. W. Long, be and they are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898 or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the County Clerk of Jefferson County, or to any officer of the City of Louisville, or to the County Clerk of Franklin County, or to any officer of the Board of Councilmen of the City of Frankfort, or of the County of Franklin; and the defendants, the City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring

to collect any tax upon such valuation; and the complainant, by making payments in accordance with the Hewitt Law, is discharged in full from all taxes to be extracted from it under any form or by any authority.

"It is further adjudged, ordered and decreed, by reason of the several pleas of *res judicata,* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of Article 2, of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not during its corporate existence be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the Act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2 and 3 of Article II of the said Act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendants its costs in this action expended.

"The defendants say that the said decree has never been in any way modified, reversed or annulled, and still stands in full force and effect, and the defendants plead and rely upon the same as a defense to this proceeding. The defendants will, if desired, present to the Court the full record of the proceedings in the said cause.

"Defendants say that in the years 1898, 1899 and 1900 the only method by which the property of the Bank of Kentucky could be assessed was under the Act of November 11, 1892, which provided for an assessment for all purposes—State, county and municipal—by the Board of Valuation and Assessment or by the Hewitt Law, which provided that the banks should make reports as of July 1st of each year to the Auditor of Public Accounts, and should make payment to him of taxes of a certain rate, and should not be subjected to any other State, county or municipal taxation, except upon the real estate of the bank used in its business; that under and by virtue of the decree aforesaid, the Bank of Kentucky established the proposition that it could not be assessed under the Act of November 11, 1892. It has fully complied at all times with the Hewitt Law; made all reports and paid all taxes required of it under that Act; and to make an assessment against it in this proceeding would be in violation of the said decree and of the rights secured to these defendants under the Constitution and laws of the United States and as fully set forth in the decree aforesaid. And defendants rely thereon as a full defense in this action, and severally to each claim set up herein.

"4. The defendants further say that the National Bank of Kentucky is a corporation organized under the laws of the United States, particularly that body of laws styled the National Bank Act, and that there is no authority in this Court to assess any of the property of the said National Bank of Kentucky herein sought to be assessed, nor to fix any lien thereon, and that any proceedings herein which have the effect of assessing the capital or surplus of

said National Bank of Kentucky or fixing any lien thereon are in violation of the laws of the United States; and they rely upon the exemption and immunity contained in said National Bank Act against any proceedings herein." *

EFFECT OF JUDGMENT OF THE FEDERAL COURT.

It must be admitted, we think, that this Court has finally determined what was the effect of the judgment which we plead in this case. That judgment provides, among other things, as follows:

> "It is now adjudged, ordered and decreed that the defendants, Samuel H. Stone, Charles Finley and Geo. W. Long, be and they are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the County Clerk of Jefferson County, or to any officer of the City of Louisville, or to the County Clerk of Franklin County, or to any officer of the Board of Councilmen of the City of Frankfort, or to the County of Franklin; and the defendants, the City of Louisville, County of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring to collect any tax upon such valuation; and the complainant, by making payments in accordance with the Hewitt Law, is discharged in full from all taxes to be extracted from it under any form or by any authority.

*In printing this from the answer we have disregarded and corrected clerical errors in the record.

"It is further adjudged, ordered and decreed, by reason of the several pleas of *res judicata,* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of Article 2 of the Act of the General Assembly of the State of Kentucky, entitled 'An Act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate, used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the Act of November 11, 1892, in so far as they are intended to provide, or do provide, for any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2 and 3 of Article II of the said Act approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

This Court, in the case of Deposit Bank vs. Frankfort, 191 U. S., 499, was called on to consider a judgment of similar import rendered in favor of the Deposit Bank of Frankfort. In that case it appeared that the former judgment of the State court, relied on by the De-

posit Bank in its litigation in the Federal court, was reversed after the judgment in favor of the Deposit Bank had been rendered in the Federal court. This Court held that that did not at all affect the rights of the parties, and among other things said (page 514):

> "The things established by the Federal decree relied upon here was the binding and conclusive character of the contract embodied in the Hewitt Law and its acceptance. That it was such a contract was then adjudicated, and, irrespective of the reasons given for the decision, must remain concluded until the judgment constituting such adjudication is modified or reversed."

Again this Court said, at page 520:

> "The decree of the Federal court of 1898 gave judgment that the bank had a contract absolving it from all taxes, including those sued for. When the State court refused to give that judgment effect it denied a right secured by the Federal court judgment upon matters wherein its decision was final until reversed in an appellate court, or modified or set aside in the court of its rendition. In our judgment, the adjudication of the Federal court relied upon here, although based upon the judgment of a State court given as a reason therefor, is equally effectual as it would have been had the Federal court reached the conclusion, as upon the original question, that the Hewitt Law constituted a binding contract between the parties. Any other conclusion strikes down the very foundation of the doctrine of *res judicata*, and permits the State court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before

them relying upon rights guaranteed by the Federal Constitution and established by the judgments of the Federal courts."

That the decree of the Federal court established the fact that the Hewitt Law was a binding contract, without any regard to the reasons given therefor, is apparent not only from the quotations we have made from the opinion of the majority in the case of Deposit Bank vs. Frankfort, but also from the dissenting opinion. Indeed, it is perfectly clear that the members of the court deciding this case joined issue upon the very point now under consideration. Thus the Chief Justice, in delivering the dissenting opinion, says:

"And I submit that the thing adjudged by the Circuit Court of the United States was not that the Hewitt Law constituted a contract between the State and the banks, which exempted the banks from this taxation, but was that the Board of Councilmen was estopped to deny the alleged contract because of the decree of the Franklin Circuit Court. This is explicitly stated in the decree as the ground of the decree, and the decree could have rested on no other ground, as the suit was in effect a suit to enforce the State court decree, and, conceding the potency attributed to the doctrine of *res judicata*, the Circuit Court of the United States could not have exercised an original judgment on the question of contract or not, but was compelled to accept the existence of the contract as 'established' by the decree of the Franklin Circuit Court."

It follows, therefore, that this Court has decided the proposition that the Bank of Kentucky had a valid and binding contract under the Hewitt Law—a contract

which the Commonwealth of Kentucky could not alter or change, and that by the terms of that contract the property of the Bank of Kentucky and its shares of stock could not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and could be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business.

It is further expressly decided that the provisions of the present Constitution of the Commonwealth of Kentucky and the Act of November 11, 1892, insofar as they were intended to provide or did provide any assessment for taxation of the property of the Bank of Kentucky, its rights of property or franchise or shares of stock, except to the extent and in the manner provided by Sections 1, 2 and 3 of Article II of said Act approved May 17, 1886 (the Hewitt Law), and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of, and repugnant to, the Federal Constitution and void.

The difference between the taxation under the Hewitt Law and the taxation under the Act of 1892 is very wide. Thus, under the Hewitt Law the bank paid seventy-five cents a share upon its capital stock, without regard to the value of that capital stock. It might be less than par or more than par in value. Besides this, the bank paid the ordinary rate of taxation upon the surplus, less 10 per cent. It paid no local taxes whatever except upon the real estate used in its banking business. The report of the

bank was to be made on July 1. It was as of that date that the capital stock was to be ascertained, and the amount of surplus and undivided profits ascertained. Under the Act of 1892 the bank was required to report on or before March 1, that report to be made up to and including the 31st day of the preceding December (Section 4092). It was the duty of the State Board of Valuation and Assessment to ascertain the total value of the capital stock of the bank. Among other things required to be reported was the amount of capital stock, the par and real value thereof. The State Board of Valuation and Assessment, under Section 4077, were to find the value of the franchise, which, as we explained above, is the total value of all the property of the bank and as increased by the exercise of its franchise, less the assessed value of its real estate. Upon this value the bank was to pay to the Auditor the taxes due to the State, and the Auditor was to certify the value of the franchise to the county clerk of every county where the franchise was exercised, with an apportionment thereof among all of the taxing districts of such county, if the franchise was exercised in more than one taxing district. As a matter of fact, so far as the Bank of Kentucky was concerned, the report had to go to the County Clerk of Jefferson County, for the City of Louisville, and would have gone also for the County of Jefferson if the County of Jefferson levied any tax upon property in said City of Louisville. This, as explained above, it did not at this time do. Again, the proportion had to be certified to the County Clerk of Franklin County for the purpose of taxation by

Franklin County, and also for the purpose of taxation by the City of Frankfort.

How, then, can it be said, as is claimed in argument, that the Act of 1892 in any way governed the Bank of Kentucky as to its assessments? It is not disputed that so long as it was in existence it fully complied with the Hewitt Law. The complaint is made, however, that, its existence having been terminated by the repeal of its charter on May 1, 1900, it was under obligation, notwithstanding it had ceased to exist, to make a report on the first day of the next July, or, in lieu thereof, to be assessed under the Act of 1892; and it is argued that if this is not true, then its property will have escaped taxation for a certain time. Whether this last is or not true, depends upon whether the tax paid on the first of July is for the coming or the past fiscal year; but however that may be, where there are varying dates of assessment, or indeed fixed dates of assessment at all, it is impossible to prevent some property from not being taxed for a limited time and some from being twice taxed for the same time. Take the ordinary case of the individual. At the period of which we are speaking, the property of individuals was assessed as of September 15. If, therefore, an individual brought into the State of Kentucky after September 15 any amount of personal property and, parting with it, it went out of the State prior to the next 15th of September, no tax whatever would have been levied upon it. On the other hand, if he brought such personal property into Kentucky September 14th and took it out again September 16th, or it perished that day,

he would have to pay the tax for the full year. Again, reports of banks, under the Act of 1892, were required to be made on March 1, as of December 31. Now we may easily suppose a case where, on the first day of September, a bank had $2,000,000 of assets, and lost $1,000,000 of them prior to the 31st day of December. When it came to make its report as of the 31st of December, for taxation, it would simply report the assets it then had. Again, a bank might have $2,000,000 of assets on the 31st of December, and lose $1,000,000 of these assets prior to the 1st day of March. Although its report would not be made before March 1, yet as it would have to make this report as of December 31 it would have to be taxed on the whole $2,000,000.

Again, as stated above, railroads are required to report their tangible property as of July 1. A railroad, therefore, owning Blackacre on July 1 would have to report it for taxation. If it had bought Blackacre on the 29th of June it would have to report it as of the first day of July. If it sold Blackacre to an individual prior to September 15, the individual would likewise have to report it. If, however, the railroad were to buy Blackacre on the 2nd of July and sell it to an individual on the 16th of September, neither would have to return Blackacre. We do not at all undertake to say that either individuals or corporations could fraudulently pursue such a course, but, given the bona fides of such transactions as we have instanced, the State would in some instances twice tax the same property, and in other instances property would not be taxed for the whole or a part of a year.

PROPERTY IS ALWAYS REQUIRED TO BE ASSESSED AS OF A CERTAIN DATE.

In Commonwealth v. Riley's Curators, 24 K. L. R. 2006, it was contended that the party proceeded against was not bound for the tax, because, after the 15th day of September of the year 1896, and before the beginning of the year 1897, he had parted with the possession of the property. The court cited with approval the case of Baldwin v. Shine, 84 Ky. 507, and quoted this language:

> "The assessment is made as of a certain day of each year. The liability is fixed as of that day, and the owner or possessor of the property upon that day is bound for the tax, although he may subsequently part with it."

This is what was held in the case of Baldwin v. Shine, and it is not necessary, therefore, for us to quote again from the latter case.

In Wangler Bros. v. Black Hawk Co., 56 Ia., p. 384, S. C. 9 N. W. 314, it appeared that on the 11th of January, 1878, the plaintiffs purchased a stock of goods in Waterloo, Black Hawk County, Iowa, and afterward, during the months of February and March following, purchased other goods. On April 1, 1878, the assessor assessed the stock of goods of the plaintiffs, and taxes were levied thereon. An action was brought to enjoin the collection of the taxes. It was provided by statute that all taxable property should be taxed each year, and personal property should be listed and assessed each year, in the name of the owner thereof on the 1st day of January. The court said:

"Under the statute as we construe it, personal property must be assessed and taxed in the name of the person owning it on the 1st day of January of each year. If assessed to any other person than such owner, the assessor exceeds his jurisdiction, the assessment is illegal and so are the taxes levied."

* * * * * * * * * * * *

"Personal property not in this State on the 1st of January is not taxable for that year."

In Pennsylvania Coal Co. v. Porth, City Clerk, 63 Wis. p. 77, S. C. 23 N. W. 105, a foreign corporation dealing in coal in Milwaukee had on hand on May 1, 1884, personal property of the value of $10,928.00. The tax assessors ascertained that the average amount of property held by the Coal Company for the year preceding May 1, 1884, was $30,000.00, and made an assessment to that amount. The court held that this could not be done. It said:

"The statute provides that all personal property shall be assessed as of the 1st day of May in such year. . . . These provisions clearly fix the property for taxation in its location and ownership on the 1st day of May. . . As to this kind of property, its value on that day is taken as the basis of assessment. These provisions of the statute are so plain that they do not admit of construction or exposition. . . . It would be pure legislation for the courts to hold, under the present law, that the company could be legally assessed upon the average value of the coal which it had in its possession or under its control during the year. That might be a very just and fair rule, but until the legislature prescribed it the assessors and taxing officers have certainly no right or authority to assess personal property like that under consideration upon that basis."

In Southern Insurance Company v. Board of Assessors, 49 L. Ann. 401, S. C. 21 Southern, 913, the Insurance Company had on hand on December 31, 1894, $95,929.00. They paid out for losses after that date certain sums, so that on the 1st of March the company had but $25,526.54. It was insisted that as the assessors did not complete their assessment until the 1st of March the company had the right to take into consideration its losses. The court held that the assessment must be made as of the 1st day of January, and it mattered not what happened thereafter. The court said:

> "Counsel in argument selected, by way of illustration, a number of special cases by which they sought to show the injustice or injury which would be done either to the State or to individual taxpayers by not adopting the theory advanced by them, but that is not a proper method of dealing with the subject. The assessment of property for the purposes of taxation and the levying of taxes upon the assessment of property has to be considered as a system, and not from a consideration of the results, good or bad, which may result therefrom in particular instances. Cases of individual hardship or inequality will result, no matter what system may be adopted. What is necessary is that there should be some fixed rule established withdrawing from officials and from the taxpayers themselves a power of control over the performance of their duties. What might in some particular year, under a fixed rule, lead up to an apparent hardship or injustice against the taxpayer, would the next, under the operation of the same rule, lead up to an apparent hardship or injustice to the State. The hardship or the benefits of the system will, during a series of years, doubtless be found to be equalized or compensated. We think

the plaintiffs took a correct view of the law when, on the 29th of January, they made a return, showing the condition of the company's cash account, not as of that day, but as of the 1st of January, 1895. The 'levying' of taxes is for 'calendar years,' and the 'assessment' of property for the 'purpose of levying' the 'annual taxes' is likewise for the calendar year. That this is the correct rule is manifest from reading the constitution itself and various revenue laws levying taxes. If one citizen were to make his assessment on the 2d of January, another on the 10th of January, another on the 1st of February, another on the 15th of February, there would not be that uniformity as much demandable in matters of assessment as there is in the establishment of the rate of taxation."

The converse of this case is found in Dodge, Assessor, v. Nevada National Bank, Circuit Court of Appeals, Ninth Circuit, 109 F. R. 726. In that case it appears that the day fixed for assessment in California was the first Monday in March. On the first Monday in March the only law relating to the assessment of national banks was one which was unconstitutional. Another law was passed, however, which took effect on March 14, 1899, and it was insisted that the Nevada National Bank should be taxed under that law for the fiscal year beginning the first Monday in March. The court held that the law was not in its language retroactive, and continued as follows:

"The contention of counsel for appellant that the provisions of the constitution and of the codes do not prohibit the assessor from making a valid assessment after the statute became a law, because they only mention the time 'when the ownership and valu-

ation of property should be determined,' falls far short of giving a proper construction of the constitution and codes with reference to their application to the real question under consideration. The entire system of taxation in the State of California plainly contemplates the existence of property liable to be assessed for taxes, and that its assessment, at whatever date actually made, shall relate to some fixed period of time, and that the taxable status of the property is to be determined by its condition on that day. The constitution and codes clearly designate the time when the assessable character of property becomes fixed, to wit, 'at 12 o'clock, meridian, on the first Monday in March,' and the question here involved must be determined with reference to that date. The initial right of the assessor to assess any property during the assessing period relates to that day. The assessor is not authorized to assess any property that is exempt from taxation on that day. The owner or party in control of property is not required to include in his list, to be given to the assessor, any property not subject to taxation on the first Monday in March in each year. That is the time the lien on the property for the taxes attaches, regardless of the date when the assessment is made. The property assessed in this case was in existence on the first Monday in March. At that date there was no law in force which made it taxable. From every standpoint that can be legally taken of this question the conclusion becomes inevitable that the attempted assessment in this case was not warranted by any law, and is absolutely null and void. This point is conclusive of the question presented; and renders it wholly unnecessary to consider the constitutional questions elaborately discussed by the respective counsel. The decree of the Circuit Court is affirmed, with costs."

Taxing laws are such as the legislatures make them. They do not admit of fraudulent evasion but by reason of the difference in date of assessment property which is not taxed for a full year may exist, or be taxed for a full year and not exist for more than a few days. Suppose that the charter of the Bank of Kentucky, instead of having been repealed on May 1, had been repealed on January 1, and the bank had divided its assets among its stockholders; is there any pretense that anybody would have been compelled to report these assets as of July 1? Or suppose its charter had been repealed on the 16th of September, 1898, and its assets had been distributed to its stockholders; who would have reported these assets for taxation? The answer is obvious. If, therefore, it be true that the Bank of Kentucky had a contract with the Commonwealth of Kentucky under which it could not be taxed in a different mode or at a greater rate than as prescribed in the Act, how can it be claimed that this contract is not violated?

A PROCEEDING UNDER SECTION 4241 OF THE KENTUCKY STATUTES IS IN PLAIN CONTRADICTION OF THE DECREE OF THE FEDERAL COURT.

Section 4241 of the Kentucky Statutes, the whole of which will be given in the Appendix, provides: "It shall be the duty of the Auditor's agent to cause to be listed for taxation all property omitted from taxation, or any portion of property omitted by the Assessor, the Board

of Supervisors, Board of Valuation and Assessment or Railroad Commission, for any year or years." Which one of these officers omitted to assess this property? Certainly not the local assessor; there was no right whatever in him to assess the capital or surplus or undivided profits of the Bank of Kentucky on September 15, 1899, or at any time. This, because the Bank of Kentucky was, if bound by the Act of 1892, one of the corporations required to make a return to the Auditor for the purpose of having its property valued by the State Board of Valuation and Assessment. The Board of Supervisors is a county board whose duty it is to supply omissions made by the county assessor, and if the county assessor had no duty in regard to the capital and surplus and undivided profits of the Bank of Kentucky, neither had the Board of Supervisors. The Railroad Commission, of course, is excluded. We then come to the Board of Valuation and Assessment. Did it omit to assess the property of the Bank of Kentucky for the year 1899-1900? It did not assess the property, but the reason why it did not assess the property is that by the decree of the Federal court it had been expressly enjoined from so doing. The proposition, then, is this: the State Board of Valuation and Assessment, whose duty it would ordinarily be to assess the capital, surplus and undivided profits of the bank, is enjoined from assessing the capital, surplus and undivided profits of a particular bank. In obedience to the decree it does not so assess. Thereupon the revenue agent can take a proceeding in the county court and procure the assessment of this capital, surplus and undivided

profits, from the county judge. But this assessment can not be procured from the county judge unless there has been an omission of duty on the part of some other assessing officer. It is plain that there has been no such omission; in fact it is clear that the Bank of Kentucky did not fail to do anything which it was required by law to do. It did not give in its capital, surplus and undivided profits to the Assessor of Jefferson County as of September 15, 1899, because it was not its duty to do so. It did not file a report with the State Board of Valuation and Assessment as of the 31st day of December, 1899, because it was not required to do so. When the 1st of July, 1900, rolled around, by act of the Legislature of Kentucky it had ceased to exist for sixty days. It might have ceased to exist for nine months and exactly the same questions be made against it then as are made here now.

We therefore submit that it is clear that to sustain this action under Section 4241 it is necessary entirely to override the decree of the Federal court and to break down the contract which that decree establishes as having been made by the Bank of Kentucky.

THE COUNTY OF JEFFERSON HAS NO STRONGER CASE THAN THE STATE OF KENTUCKY.

The judgment of the County Court as affirmed by the Circuit Court and the Court of Appeals, gave the County of Jefferson taxes for two years—1898-99 and 1899-1900. This was upon the theory that the County of Jefferson was not bound in any way by

the judgment rendered by the Circuit Court of the United States. We submit that this claim will not bear examination. As stated above, under the Hewitt Law no taxes at all were to be paid to the local communities, a tax of seventy-five cents a share and the ordinary rate of taxation on the surplus over and above ten per cent thereof all going to the State, and the local community receiving no taxes except upon real estate of the banks used for business purposes. The rate of seventy-five cents a share on the capital stock of the bank was at least thirty-three per cent higher than that imposed on other property, the tax rate for State purposes being generally less than fifty cents. When, therefore, the Bank of Kentucky reported and paid its taxes on July 1, 1899, under the Hewitt Law, it paid a largely greater sum to the State than it would have been compelled to pay if it were taxable under the act of 1892.

Under this act, as explained above, the method of taxation of banks was fully prescribed. The bank was required to report to the Auditor of Public Accounts its condition; that is, the amount of its capital, surplus and undivided profits as of December 31, such report being made on or before March 1. Acting upon this report and such other information as the Auditor or the Board should obtain, the State Board of Valuation and Assessment valued the franchise of the bank, which was the value of its assets, including such additional value as was imparted to those assets by the exercise of its franchise.

Thus in Marion National Bank vs. Burton, Sheriff, 28 K. L. R., 864; S. C., 90 S. W., 944, the court said:

> "We are perfectly satisfied from a study of these sections that the legislature has intended to tax all the property of these corporations, State banks and trust companies included; that the tax is to be imposed upon the real property just like all other real property is assessed; that their intangible property which includes their capital, and the value accruing to it by its earning capacity employed as it is under the corporation's charter, shall likewise be taxed; the latter is called, for purposes of classification, a franchise tax, but it is none the less a property tax, imposed upon the intangible property of the corporation. * * * In our opinion it follows that the legislature, in taxing State banks, has, by the provisions of the statutes which have been quoted, required the assessment of all their property, including their intangible property, which latter is arrived at by considering the earning value of their capital, and by taxing the capital at that value less the value of their real estate assessed separately."

Having thus ascertained the value of the franchise it was the duty of the Auditor to apportion this value among the local communities in which the franchise was exercised, so that it might be subjected to the local tax-rate. The Auditor was required to certify this apportionment to the County Clerk of each county, who in turn certified it to the collecting officers of the various taxing districts in the county. In order, therefore, for the taxing district to have a right to collect a tax against a corporation whose property was subject to this method of assessment, it was necessary to have the State Board of Valuation fix the total value, and the Auditor the due

apportioned value. This method is prescribed for all corporations carrying on a public business. Thus take the Louisville & Nashville Railroad Company. Its so-called franchise is fixed by the State Board of Valuation and Assessment by that body determining the total value of its capital stock. This total value having been ascertained there is apportioned to Kentucky (the Louisville & Nashville having lines in and out of the State) substantially a mileage proportion. From this is then deducted the tangible property assessed by the Railroad Commission and the difference is the value of the franchise of the Louisville & Nashville Railroad Company. The Auditor certifies to each county through which the Louisville & Nashville Railroad operates a proper proportion of such value, which is taxable by the county, by the towns in the county and by the school districts in the county, and by any other taxing district which may for any purpose have been created.

We may state, without exaggeration, that there are hundreds of these taxing districts to whom this certification is made and to whom some part of the total value of the franchise of the Louisville & Nashville is apportioned. The question, then, presents itself—suppose that the Louisville & Nashville Railroad Company desires to contest the valuation made by the State Board of Valuation and Assessment, or to raise a question before that board as to whether certain of its property is taxable or how taxable; or suppose that the Louisville & Nashville Railroad Company had a contract with the State of Kentucky similar to the Hewitt con-

tract, under which it would pay taxes to the State and not to the local communities—can it be that to bring a suit to test this question it would be necessary to make each one of these hundreds of taxing districts party defendant? We can certainly say that this has not been the practice in Kentucky, and that it has been assumed that the suit against the State Board of Valuation and Assessment would finally determine the rights of all the parties, including the local communities claiming under a valuation and apportionment to be made by this Board and by the Auditor.

The case is entirely different from that decided by the Circuit Court relied upon by defendant in error—Northern Bank of Kentucky v. Stone, 88 F. R. The question there was whether *res adjudicata* against one county could be pleaded as against another county, each county claiming in its own right. The learned court was very careful to use the following language so as not to foreclose the question now before the Court:

> "We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment against the State, adjudging a limitation upon the taxing power. It suffices to say that the question is, in some important respects, different from the one we have been discussing."

Here we have a decree which expressly and in terms provides that the State Board of Valuation and Assessment "are hereby perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years

1895, 1896, 1897, 1898, or for any subsequent years during the corporate existence of the complainant, and are enjoined and restrained from certifying such value to the County Clerk of Jefferson county or to any officer of the City of Louisville or to the County Clerk of Franklin county, or to any officer of the Board of Councilmen of the City of Frankfort, or of the County of Franklin."

If, therefore, the County of Jefferson had called on the State Board of Valuation and Assessment to assess the franchise of the Bank of Kentucky, it would have answered at once, There is an injunction against this Board from making such assessment and certifying such assessment to the County Clerk of Jefferson county. If the County of Jefferson had attempted by mandamus to compel the State Board of Valuation and Assessment to make the assessment and certification, it could at once have pleaded this decree as a complete defense. Bank of Kentucky v. Stone, 88 F. R., 384, at page 398.

This case is unlike that of Henderson County v. Henderson Bridge Company, 116 Ky., 176, but is similar to the authorities cited by the learned Court in that case as distinguishing such a case as this from the one then at bar. Lyman v. Faris, 53 Iowa, 498; Harmon v. Auditor, 123 Ill., 122, and other authorities cited in Henderson County v. Henderson Bridge Company, 116 Ky., 179.

As stated above, the reason why the City of Louisville, County of Franklin and the Board of Councilmen of the City of Frankfort were made parties defendant to the original suit, was that at the time this suit was brought

the Board of Valuation and Assessment had already endeavored to assess the franchise of the bank, and had certified the apportionment to the County Clerk of Franklin and of Jefferson county, for taxation by Franklin county, City of Frankfort and the City of Louisville—but not for taxation by the County of Jefferson, because at that time the County of Jefferson levied no taxes on property inside of the city limits. There was, therefore, no cause of action against the County of Jefferson on any certification theretofore made, because for no year in which the certification was made had there been any levy by the County of Jefferson, or, therefore, any threat by the County of Jefferson to exact any taxes. But the decree, as giving the broad relief for the future, was drawn in the terms which we have repeatedly set out in the course of this argument.

We, therefore, respectfully submit that the County of Jefferson is clearly bound by this decree as privy thereto.

THERE WAS NO LIEN ON THE ASSETS OF THE BANK OF KENTUCKY WHEN THEY WERE ACQUIRED BY THE NATIONAL BANK OF KENTUCKY.

There is no authority, either statutory or judicial, for the proposition that there is any lien upon the property of any individual or corporation for taxes prior to the date fixed for the assessment of that property. This must be the case. For there can be no lien except upon property subject to assessment. And until assessment day it can not be known what property exists subject to

assessment, or against whom the assessment is to be made. There may be an inchoate lien after assessment day and before an actual assessment. But there can be no inchoate lien prior to assessment day. Thus there is no lien upon the property of an individual for taxes prior to the assessment date—September 15. There is no lien upon the tangible property of a railroad prior to the assessment day—July 1. There is no lien upon the property of a bank prior to its assessment day—December 31. To claim, therefore, that the National Bank of Kentucky, in order to acquire the assets of the Bank of Kentucky, took them subject to a lien, is to beg the whole question. If the day of assessment had arrived then it was the duty of the Bank of Kentucky to report its property subject to assessment and pay the taxes. If the day of assessment had not arrived, it was not the duty of the Bank of Kentucky to report or pay, and there could be no lien for taxes. The report to be made under the Hewitt Law was to be made as of July 1. The condition of the bank then governed the assessment. What assets it had on the preceding 15th of September or December 31 was entirely immaterial. They might have been more or they might have been less than the assets held by the bank on July 1. If on September 15, 1899, the surplus of the Bank of Kentucky had been two million dollars, and it had lost one million dollars of this surplus before May 1, 1900 (the day when all of its assets were transferred to the National Bank of Kentucky), it could not be claimed that there was a lien for taxes upon the two million dollars of surplus; because

if the Bank of Kentucky had continued in existence until July 1st, it would have been compelled to report not the two million dollars, but the one million dollars. So, on the other hand, if the surplus of the Bank of Kentucky on September 15 or December 31 had been one million dollars, and had been increased to two million dollars by July 1, and the bank had then been in existence, it would have been compelled to report the two million dollars.

The property owned by the taxpayer upon the assessment day must necessarily govern his assessment. If he parts with his property before assessment day, he can not be liable for the taxes, nor can there be any lien for the taxes.

THE NATIONAL BANK OF KENTUCKY CAN NOT BE ASSESSED UPON ITS ASSETS.

We do not consider it necessary to cite any authorities to support the proposition that the National Bank of Kentucky could not be assessed upon its assets, and that the only method of assessing that bank was to assess the shares of stock of its stockholders. The judgment, therefore, assessing the assets of the National Bank of Kentucky is erroneous.

We respectfully submit that the judgment of the Court of Appeals should be reversed and the case remanded, with directions to that court to remand it to the court of first instance with directions to dismiss the complaint.

Respectfully,

ALEXANDER POPE HUMPHREY,

Counsel for Plaintiffs in Error.

APPENDIX.

HEWITT LAW.

"Sec. 1. That shares of stock in State and National Banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation

is located, institute an action in any court having civil common law jurisdiction of the amount involved for the recovery of the fine.

"Sec. 2. The cashier of a bank and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: 'I, ————, swear (or affirm) that I am the ——— of ————, and that I have in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said ———, and how or in what said surplus, undivided profits, or undivided accumulations is invested.'

"Sec. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to ten per cent of such capital stock, the excess of the

amount so invested over the amount equal to ten per cent of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith and not for the purpose of avoiding taxation.

"Sec. 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank, and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said banks may take the proceeding authorized by Section 4 of this Act at any time until the meeting of the next General Assembly: *Provided,* They

pay the tax provided in Section 1 from the passage of this Act.

"Sec. 6. This Act shall be subject to the provisions of Section eight (8), Chapter sixty-eight (68), of the General Statutes.

"Sec. 7. If any bank, State or National, shall refuse or fail to pay the tax imposed by this Act, or shall fail or refuse to make the consent and agreement as prescribed in Section 4, the shares of stock of such bank, institution, or corporation and its surplus, undivided accumulations and undivided profits shall be assessed as directed by Section 2 of this Act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided,* That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

KENTUCKY STATUTES.

Sec. 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State. whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate

franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale.

Sec. 4052. All taxable estate shall be assessed and valued as of the fifteenth of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation

and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

Sec. 4084. The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax; and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same.

Sec. 4092. All banks and trust companies shall file the report herein required by Section 4077, Subdivision 1, of this article, on or before the first day of March, one thousand nine hundred and three, and annually on or before March first, thereafter. Said reports shall be

made up to and including the thirty-first day of the preceding December. The taxes herein provided for shall be due and payable on or before the first day of July next succeeding such report. Upon failure to make said report or to pay said taxes as herein required, said banks and trust companies shall be subject to the same fines and penalties as prescribed in Section 4091, Subdivision 1, of this article.

Sec. 4096. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad lying in whole or in part in this State, shall, on or before the first of September in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing districts therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as

the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of September shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of September that he fails to file said report, to be recovered as indicated by Section 4104 of this article.

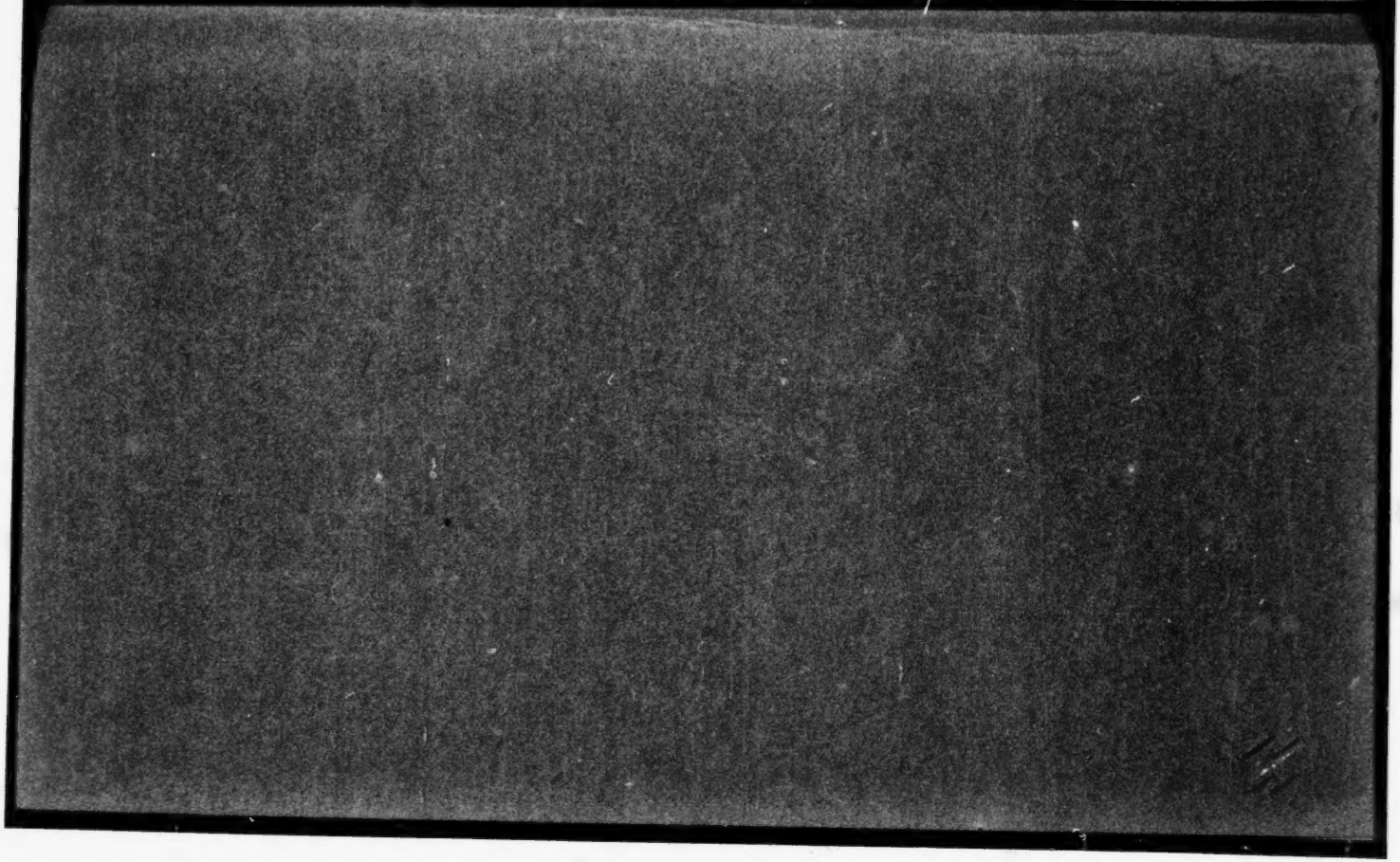
Section 4102. The same rate of taxation for State purposes which is or may be in any year levied on other real estate, shall be, and is hereby, levied upon the value, so found by said board, of the railroad, rolling stock and real estate of each company; and the same rate of taxation for the purposes of each city, town, part of a county or tax district of any kind, in which any portion of any railroad is located, which is, or may be, in any year levied on other real estate of said company therein, and of the number of miles of said road, therein, reckoned as of the value of the average of each mile of such railroad, with its rolling stock, as ascertained as aforesaid: *Provided,* That railroad bridges spanning any river, which constitutes the boundary or State line of the Commonwealth, shall be assessed as of the counties in which they are located, and local tax derived therefrom shall be applied to each city, town, county or tax district in which said bridges are or may be located; and immediately after said board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the clerk of each county court of the amount so assessed for taxation in

his county, and each railroad company of the amount of its assessment for taxation for State purposes and for the purposes of such city, town, county, part of county and tax district.

Section 4241. It shall be the duty of the sheriff or Auditor's agent to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property proposed to be assessed, and the value of corporate franchise, if any, and the name and place of residence of the owner, his agent or attorney, or person in possession of the property, and the year or years for which the property is proposed to be assessed. Within five years after the filing of such statement, the clerk of the court shall issue a summons against the owner to show cause before the next regular term of the county court, which does not commence within five days after service of such summons, why such property or corporate franchise, if any, shall not be assessed at the value named in the statement filed. The summons shall be executed by the sheriff of the county by delivering a copy thereof to the owner, if in the county, if not, then to his agent, attorney or person in possession of the property. At the next regular term of the county court after the notice has been served five days, if it shall appear to the court that the property

is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order *if* the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation. If the court shall decide that the property is liable to assessment, the clerk of the county court shall certify to the Auditor of Public Accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the amount of penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum on the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalties shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected. The county clerk shall enter all such assessments in a book to be kept for that purpose, showing the date of the assessment, the name of the person against whom the assessment is made, the location and quantity of the property assessed, the value fixed thereon; and the officer collecting the tax

shall, when the same is paid, notify the clerk of its payment, which payment shall be noted by the clerk opposite the entry of such assessment.



Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 87.

BANK OF KENTUCKY, ET AL., - - - *Plaintiffs in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Brief For Defendant in Error.

STATEMENT.

This proceeding was instituted January 13, 1903, by the filing of a statement in the Jefferson County Court in behalf of the defendant in error, the Commonwealth of Kentucky, by T. C. Albritton, revenue agent for the State at large, against the plaintiffs in error, Bank of Kentucky, National Bank of Kentucky, Oscar Fenley, president, and E. W. Hays, cashier, of said banks, under Section 4241, Kentucky Statutes (Carroll's Compilation, 1903), which provides that it shall be the duty—

> "of Auditor's agents to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years."

By the same section it is provided that—

"if it shall appear to the court that the property is *liable* for taxation and *has not been assessed,* the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable for assessment, either party may appeal as in other civil actions, except that no appeal bond shall be required where the court decides that the property is not liable to assessment or taxation. If the court shall decide that the property is liable to assessment, the clerk of the County Court shall certify to the auditor of public accounts and the sheriff a description of the property and the amount of the assessment for taxation, together with the amount of the penalty and cost of assessment. All persons owning property which may be assessed as herein provided shall, in addition to the taxes, pay a penalty of twenty per centum of the amount of the taxes due and cost of assessment, except where such property shall have been duly listed by the owner thereof. The taxes and penalty shall be collected and accounted for as other taxes and penalties are required to be collected. As compensation for his services in causing such property to be assessed, the officer filing his statement shall be entitled to the penalty, which shall be paid to him after the full amount of taxes shall have been collected."

(This section covers omitted assessments for both State and county taxes.)

It will be observed from the statement filed by defendant in error (R. 2-6) that it is claimed that the plaintiff in error, Bank of Kentucky, a bank organized under the laws of the State of Kentucky, was not assessed upon its franchise by the board of valuation and assessment as of September 15, 1898, for the year 1899, nor as of September 15, 1899, for the

year 1900, for the *county* taxes of the county of Jefferson, and that it was not assessed as of September 15, 1899, or as of any other date, for *State* taxes for the year 1900. It is further alleged therein that the capital stock of this bank at each of said dates was $1,645,100, and the amount of its surplus during said period was at least $1,102,928.90, making a total of $2,748,028.90 subject to assessment and taxation by the county of Jefferson. For the year 1899 the county levy was seventeen (17) cents on each one hundred dollars, and for the year 1900 the county levy was fifteen (15) cents on each one hundred dollars. For the year 1900 the State levy was forty-seven and one-half (47½) cents on each one hundred dollars. The county tax on the value of said bank's franchise or intangible property for the year 1899 is alleged to be $4,671.64, and for the year 1900 the county tax is alleged to be $4,122.04, and the State tax for the year 1900 is alleged to be $13,053.13, no part of which sums had been paid to said county or to the State.

It is further averred that the Bank of Kentucky, through its president and cashier, plaintiffs in error, Oscar Fenley and E. W. Hays, failed and refused to list or report the property, capital stock, surplus, franchise, or intangible property for county taxes for the two years aforesaid, or for State taxes for the year aforesaid, and that the same had not been assessed for said years, but was omitted from assessment, and that the said bank made *no report* to the board of valuation and assessment in order that its franchise could be assessed for taxation by the county of Jefferson for *county* purposes for the years 1899 and 1900.

It is further alleged in the statement that said bank claimed to be entitled to pay State taxes under the provisions of the Hewitt Act of May 17, 1886, that is to say, seventy-five (75) cents on each share of its capital stock equal to one hundred dollars, and in addition on so much of its surplus, undivided surplus, undivided profits, or undivided accumulations as exceeded an amount equal to ten (10) per cent. of its capital stock, the same rate of taxation that was assessed upon real

estate, which tax was to be paid on the certified report of said bank's cashier to the auditor of public accounts, and was *due* and *payable* on July 1 of each year, and that the *State tax* on its capital stock and excess of surplus, if it had been paid for the year 1900, would have been $16,795.73; but *no report* for said year was made, or any part of said taxes paid to the State; that said bank on or about May 1, 1900, reorganized and transferred all of its assets, at that time under *lien* for. State and county taxes of the county of Jefferson, to the plaintiff in error, National Bank of Kentucky, and that the latter bank took possession of said property and assets, so under lien to Jefferson County and the State of Kentucky for taxes for the years aforesaid, and had retained possession and control thereof ever since and had converted the same to its own use and benefit, without paying any part of said taxes which were liens thereon as aforesaid; and that the plaintiffs in error, Fenley and Hays, in the reorganization continued as president and cashier of the National Bank of Kentucky, and made no report on July 1, 1900, of the amount of the value of the capital stock and surplus assets of the Bank of Kentucky, received and held by the National Bank of Kentucky in the reorganization aforesaid.

In the prayer of the Commonwealth, the court was asked to fix and assess the capital stock, franchise or intangible property of the appellant, Bank of Kentucky, at $2,748,028.90 for each of the years 1899 and 1900 for taxation by the county of Jefferson at the rates levied by the Fiscal Court of said county for said years, respectively, and for the year 1900 for taxation by the State of Kentucky at the rate fixed by law; but if the court should determine the Bank of Kentucky was not liable to an assessment of its property and franchise for State taxes for the year 1900, under the Revenue Act of November 11, 1892, then and in that event, that on said bank's capital stock and surplus there should be fixed an assessment for State taxation for said year, under the provisions of the Hewitt Act, as follows, to wit: Its capital stock at $1,645,100,

and its surplus, less an amount equal to ten per cent. of its capital stock, at $938,418.90, and that the Bank of Kentucky and National Bank of Kentucky be required and compelled to pay the taxes to said county and to the State at the respective rates mentioned, as well as the twenty (20) per cent. penalty, on the aggregate amount of said taxes due said county and State as provided by law, and the costs incurred by defendant in error in this proceeding.

The foregoing statement has been made thus explicit in order that the court may better understand the allegations of the answer of plaintiffs in error, and the defenses attempted to be interposed in bar of the assessments sought to be coerced as aforesaid.

The plaintiffs in error by their answer (R. 7-15), admit that the amount of capital stock of the Bank of Kentucky on September 15, 1898, and September 15, 1899, and during the period from the latter date until on or about May 1, 1900, were as stated in the statement of the defendant in error, and that the total value of the capital stock and surplus of said bank on said two former dates and until the latter date was as alleged. But it is denied that the same were subject to assessment and taxation by either the State or county of Jefferson for said years as alleged in the statement aforesaid. These denials are merely conclusions of law, while the main defense, it will be observed, is set forth in paragraphs 2 and 3 and consists of a plea of *res judicata. This plea is founded upon certain adjudications in cases wherein it is not alleged that the county of Jefferson was a party or privy.* It is alleged that the Bank of Kentucky went out of existence on May 1, 1900 (and that is a mere conclusion of law—not a fact, except in a qualified sense), but it is not alleged that its *assets* then went out of existence, or were removed from the State, but it is admitted that they were turned over to the National Bank of Kentucky, and, if the same were subject to taxation, it necessarily follows that said assets were under lien for such taxes and have been ever since they were received by, and converted to the use of that bank.

It is not alleged that the county of Jefferson was a party or privy to the action of the *Bank of Kentucky vs. Samuel H. Stone, et al.*, in the Circuit Court of the United States for the District of Kentucky; but it is alleged that the decree entered therein enjoined and restrained the board of valuation and assessment from assessing the franchise of the Bank of Kentucky, under the act of November 11, 1892, for certain years, and any subsequent years, during the corporate existence of said bank, and from certifying the same for taxation by the municipalities made defendants to that action, viz.: the city of Louisville, the county of Franklin and the city of Frankfort; and that the city of Louisville, county of Franklin and city of Frankfort were enjoined and restrained from endeavoring to collect any tax upon such valuation. It is nowhere alleged, nor is it true, according to the record, that the final judgment in said action enjoined the collection of taxes by the *county of Jefferson,* or the assessment of said bank's franchise *for the use and benefit of the county of Jefferson.* There is, in other words, a total failure on the part of the plaintiffs in error to allege such facts as show that any court in any case has ever decided that the *county of Jefferson* was not entitled to its taxes against the Bank of Kentucky.

In passing on the demurrer to this answer the judge of the County Court delivered an elaborate opinion, which fully sustained the contentions of counsel for defendant in error by clear and unanswerable reasoning. (R. 17-24.)

Afterward an amended response or answer (R. 24) was filed by counsel for plaintiffs in error, in the first paragraph of which it it alleged that during the years 1899 and 1900 the Bank of Kentucky employed $200,000 of its capital stock in a branch bank located in the city of Frankfort, Kentucky, and that portion of its capital stock was not, therefore, liable for assessment in Jefferson County for county taxes. In the second paragraph of this answer it is alleged that for said years the capital and surplus of the banks in Jefferson County were assessed at sixty (60) per cent. on the face of the books,

and that to assess the capital and surplus of the Bank of Kentucky at a higher rate than this would be an unjust and unlawful discrimination, contrary to the Fourteenth Amendment of the Constitution of the United States guaranteeing to all persons the equal protection of the laws, and providing that no person shall be deprived of his property without due process of law. The affirmative allegations of this amendment were by consent controverted of record. (R. 24.)

This plea under the Fourteenth Amendment was abandoned, and was not mentioned in the brief of counsel for plaintiffs in error in the court below, nor is it in his brief in this court.

Counsel for both parties, prior to the submission on the merits in the County Court, filed certain stipulations, which were to be read as evidence on final hearing, subject to exceptions for irrelevancy and incompetency. (R. 25-29.) In addition to these stipulations, the depositions of Eugene Hancock and Oscar Fenley were taken by plaintiffs in error concerning questions of value. (R. 29-37.) To certain evidence embraced in said stipulations, and testimony contained in said depositions, the defendant in error filed its exceptions. (R. 37-38.)

The cause, thereupon, having been submitted for judgment, the County Court rendered an opinion as to the *value* of the assets sought to be assessed, about which there was no controversy in the court below nor is there now in this court. (R. 38-40.)

In pursuance of this opinion, that court on December 29, 1903, rendered a final judgment fixing the value of the property described in the statement of the Commonwealth, and assessing the same for taxation in behalf of the county of Jefferson and the State, as well as fixing the several amounts due said county and the State on such assessments, and the statutory penalty thereon due the revenue agent for the State at large who instituted this proceeding. (R. 40-42.) From this judgment the plaintiffs in error prayed an appeal to the Jefferson Circuit Court, which was granted. Afterward they

prosecuted said appeal by executing an appeal bond in the latter court. To this appeal the defendant in error entered its appearance, and by stipulation of counsel the case was heard in the Chancery Branch, First Division, of that court upon the transcript of the record of the Jefferson County Court, which was to have the same force and effect as if the original record were filed on said appeal. (R. 44-45.) After the parties had been fully heard the case was decided in the latter court April 2, 1904, the court delivering a written opinion affirming the judgment of the County Court. In this opinion the Circuit Court held that all questions of value had been concluded by the judgment of the County Court, and only questions of law were reviewable on appeal, the opinion being concluded as follows:

> "The law questions presented here are the same as those argued below. I have carefully examined the record, including Judge Gregory's exhaustive and clearly cut opinion of August 11, 1903, and am entirely satisfied that he has decided the law questions correctly. As an opinion of this court would be a mere repetition of Judge Gregory's opinion, I shall merely adopt his opinion as the opinion of this court, and affirm his judgment." (R. 45.)

In pursuance of this opinion the judgment appealed from was entered April 9, 1904, being substantially the same as the judgment rendered in the County Court. This judgment is as follows (R. 46-47.):

> "The franchise or intangible property of the defendant Bank of Kentucky was omitted from assessment for the taxes of the county of Jefferson for the fiscal years 1899 and 1900, and for the taxes of the State of Kentucky for the fiscal year 1900; that the franchise or intangible property of the said defendant bank was lawfully assessable for taxes of the county of Jefferson in and for the fiscal years 1899 and 1900, and for the taxes of

the State of Kentucky in and for the fiscal year 1900, the said defendant bank, as well as the defendant, National Bank of Kentucky, having failed, or refused, to report or list the shares of stock and surplus of the said defendant, Bank of Kentucky, for State taxation and to pay the State taxes thereon for the year 1900, as required by the Hewitt Act of May 17, 1886; that the franchise or intangible property owned and held by said defendant bank in the fiscal years 1899 and 1900 was then subject to assessment and is still subject to retrospective assessment for the taxes levied on all taxable property by the Fiscal Court for the County of Jefferson, in and for said fiscal years; that the franchise or intangible property owned and held by the said defendant bank in the fiscal year 1900 was then subject to assessment for State taxes by reason of the failure or refusal of the said defendant Bank of Kentucky, or its assignee, the defendant National Bank of Kentucky, to report or list the shares of stock and surplus of the defendant Bank of Kentucky for State taxes, and to pay such taxes in and for said fiscal year, as required by the provision of the Hewitt Act aforesaid, and said defendant bank's franchise or intangible property is, therefore, subject to retrospective assessment for the State taxes in and for the fiscal year 1900. And it is now adjudged that the fair cash value of the franchise or intangible property of said bank, estimated at the price the same would bring at a fair voluntary sale, be and the same is now assessed and fixed by the court at two million five hundred thousand ($2,500,000) dollars for the taxes of Jefferson County, in and for each of said fiscal years 1899 and 1900, and at two million seven hundred thousand ($2,700,000) dollars for the taxes of the State of Kentucky in and for the fiscal year 1900.

"The court further adjudges that under the levy of seventeen (17) cents on each one hundred ($100.00) dollars of the assessed value of all property subject to taxation by the Fiscal Court of said county, in and for the

fiscal year 1899, the plaintiff is entitled to recover of the defendants, Bank of Kentucky and National Bank of Kentucky (to which latter bank the property and assets of the former bank were transferred and delivered while under the statutory lien for the amount of the county taxes for the fiscal years 1899 and 1900, and for the State taxes for the year 1900), for the use and benefit of Jefferson County, the sum of four thousand two hundred and fifty ($4,250.00) dollars; that under the levy of fifteen (15) cents on each one hundred ($100.00) dollars of the assessed value of all property subject to taxation by the Fiscal Court of said county in and for the fiscal year 1900, the plaintiff is entitled to recover of the said defendant banks, for the use and benefit of the said county, the further sum of three thousand seven hundred and fifty ($3,750.00) dollars; that under the levy fixed by law of forty-seven and one-half (47½) cents on each one hundred ($100.00) dollars of the assessed value of all property subject to State taxes in and for the fiscal year 1900, the plaintiff is entitled to recover of the said defendant banks for such State taxes the sum of twelve thousand eight hundred and twenty-five ($12,825.00) dollars; that the plaintiff is entitled to recover the further sum of four thousand one hundred and sixty-five ($4,165.00) dollars, being the statutory penalty of twenty (20) per cent. on the aggregate amount of taxes due on the assessment aforesaid, for the use and benefit of T. C. Albritton, revenue agent for the State, for county and State purposes; and that the plaintiff recover its costs herein expended of said defendants, Bank of Kentucky and National Bank of Kentucky.

"It is further adjudged that the clerk of the County Court shall certify to the auditor of public accounts and to the sheriff of Jefferson County a description of the property; that is to say, the franchise or intangible property of the Bank of Kentucky, herein assessed as aforesaid for county taxes for the fiscal years 1899 and 1900,

and for the State taxes for the year 1900, and the amount of the assessments for such taxation in each of said years, together with the amount of the penalty aforesaid and costs of assessment by this proceeding, to be taxed by said clerk, all of which taxes, penalty and costs shall be collected and accounted for by the sheriff of Jefferson County as other taxes and penalties are required to be collected, and the clerk of the County Court shall enter the assessment aforesaid in the book kept by him for that purpose, showing the date of the assessment, the names of the defendants, Bank of Kentucky and National Bank of Kentucky, against whom the assessments aforesaid have been made herein, and the value fixed thereon by the court herein, as required by law."

From this judgment plaintiffs in error prosecuted an appeal to the Court of Appeals of Kentucky, where, after full argument orally and by brief, the judgment appealed from was affirmed by that court in an opinion delivered by Judge Paynter, June 12, 1906. (R. 51-56.) This opinion is reported in 29 Ky. Law Rep. 643, and will be found printed in full in the Appendix to this brief.

ARGUMENT.

I.

TAXES DUE THE COUNTY OF JEFFERSON.

PLEA OF RES JUDICATA.

The question of the taxes claimed to be due the county of Jefferson, and the plea of *res judicata,* will be first discussed.

It is insisted that this plea as to said county taxes is totally inapplicable, and the demurrer thereto, as well as to the whole answer of plaintiffs in error, was properly sustained. (R. 17.) It is not contended that the Bank of Kentucky's plea of *res judicata* would not be good against the

cities of Louisville and Frankfort and the county of Franklin, the three municipalities made defendants in the case of *Bank of Kentucky vs. Stone, et al., 88 Fed. 383.* In the opinion in that case the court, at the outset, in stating the parties thereto and the object of the action, said (p. 385):

> "This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants, the city of Louisville, the county of Franklin and the city of Frankfort. Samuel H. Stone is the Auditor of Public Accounts for the State of Kentucky; Charles Finley is the Secretary of State; and George W. Long is the State Treasurer; and these three officers, also made defendants herein, constitute the State Board of Valuation and Assessment."

Again, the court, in dealing with the plea of *res judicata,* the parties to the prior suits and to the suit then under consideration, stated (pp. 395-6):

> "Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, the city of Frankfort and the city of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise, and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by their prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is in respect to the former judgments, privy to the city of Louisville and county of Franklin and the city of Frankfort."

Again the court said (p. 397):

"The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract and we must determine whether *as between the parties* such a contract exists. It appears that *as between the complainant and the defendants* it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the *present parties.*"

At that time the Bank of Kentucky had its main bank in the city of Louisville, in Jefferson County, and a branch bank in the city of Frankfort, in Franklin County. Only the board of valuation and assessment, city of Frankfort, county of Franklin and city of Louisville were made *defendants* to said action in the Circuit Court of the United States for the District of Kentucky.

On the appeals of *Stone, Auditor, etc. vs. Bank of Kentucky, and City of Louisville vs. Same, 174 U. S. 799,* the judgment of the Circuit Court was affirmed by a divided court May 15, 1899. It is plain and unmistakable that, no matter how broad the language of the decree awarding the injunction may have been in that case, no one was *bound* by it except the parties defendant thereto, and Jefferson County, not being a party defendant thereto, is not bound by the judgment aforesaid in any way whatever. This proposition is settled by abundance of authority.

In Kentucky a county is a separate and distinct municipal corporation, capable of suing and being sued. Section 51 of the Civil Code of that State provides:

"In an action against a county the summons must be served on the presiding judge of the County Court, or, if he be absent from the county, upon its attorney."

In the case of *Northern Bank of Kentucky vs. Stone, et al., 88 Fed. 413,* it was expressly decided that no municipality that was not a *party* to the former litigation relied on as *res judicata* was bound thereby. In that case it appeared that a suit had been brought in the State Court by the Northern Bank of Kentucky against Bourbon County to prevent that county from taxing said bank under the Revenue Act of November 11, 1892, and in the final judgment of the Court of Appeals of Kentucky in that case it had been decided that, as between said bank and Bourbon County, the said bank had a contract to pay taxes only as provided in the Hewitt Act, but the bank contended that by reason of the judgment against Bourbon County, that Fayette County, the city of Lexington, city of Covington and city of Paris (in which said bank had located branches and employed portions of its capital stock) were equally bound, and that these four municipalities could not collect taxes under the provisions of the law of 1892 from said bank; but the Circuit Court overruled this contention and held that the former adjudication in the State Court was not binding on the cities of Lexington, Covington, and Paris, and the county of Fayette. In the course of the opinion in that case the court said (*Ib. 418*):

"The subject-matter of the present action, which it is sought to conclude by the former action, is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of Covington. The rights of these various municipal corporations to the taxes claimed grow out of the

same Revenue Act of November, 1892, but the *parties* and *persons in interest* are different."

Again the court stated (*Ib. 419*):

> "Our conclusion, therefore, is that the complainant bank *can not* in this controversy with the city of Lexington, Fayette County, city of Paris and city of Covington, *and with the board of valuation and assessment, so far as concerns the apportionment and certification of the assessment by the board to those municipalities*, rely upon or derive any benefit from the decree in the complainant's favor against Bourbon County."

The court then proceeded to decide that said bank had *no* contract exemption under the Hewitt Act by reason of the former adjudication in its suit against Bourbon County to protect it from the taxes due the cities of Lexington, Paris and Covington and the county of Fayette.

In the case of *Farmers' Bank of Kentucky vs. Stone, et al.*, reported in the same volume (*88 Fed. 987*), the bank claimed exemption against taxes due the city of Georgetown, and the counties of Scott and Henderson, under the Revenue Act of 1892, by reason of former adjudications with the county of Franklin, city of Frankfort and city of Henderson, but the court overruled that contention and held that it was bound to pay taxes to the city of Georgetown, and the counties of Scott and Henderson on its branch banks located in those two counties, and sustained the demurrers of those three defendants to the bill, and dismissed the action as to them.

After the opinion had been rendered in the lower court in that case, by an amended bill an adjudication against the *county of Henderson* was set up by the Farmers' Bank of Kentucky and sustained by the lower court, hence that county was held bound thereby, but the county of Scott and the city of Georgetown were not bound by any plea of *res judicata*, because they had not been made parties to any prior suit in

which it was held said bank was entitled to pay taxes only as required by the Hewitt Act.

From this judgment the Farmers' Bank of Kentucky took an appeal to this court, which in the case of *Farmers' Bank of Kentucky vs. Stone, etc., 174 U. S. 409*, affirmed the decision of the court below, using this language (412):

> "The decree below, so far as it granted the relief prayed as against the defendants, other than the city of Georgetown and the county of Scott, is affirmed by a divided court. The decree, so far as it adjudicated against the complainant and in favor of the defendants, city of Georgetown and county of Scott, those defendants not having been *parties* or *privies* to the judgment pleaded as *res judicata*, must be affirmed, upon the authority of the decision in *Citizens' Savings Bank of Owensboro vs. City of Owensboro, etc., 173 U. S. 636.*"

From these decisions it is quite apparent, had the *county of Jefferson* been a party defendant in any of the prior adjudications in the State courts set up and relied on in the answer of plaintiffs in error, and had been made a defendant to the injunction suit in the United States Circuit Court, decided by Judge Taft, that it would be now bound thereby; but it was *not* a party to any such prior adjudication, nor was it a party to said injunction suit in the Federal Court. Again, it is clear that although the county of Jefferson had been a party defendant to that injunction suit, Judge Taft would have held and this court would have held on appeal, that said county was not concluded by any prior litigation in the State Court to which it was not a party, just as it was held in the *Northern Bank of Kentucky case, supra*, as to all the cities and counties other than Bourbon County, made defendants to that action in the Circuit Court. The county of Jefferson is, therefore, not bound by that decision in any way whatever, and it would have been entirely lawful and not in violation of any injunction, had the board of valuation

and assessment *assessed* the franchise of the Bank of Kentucky for the years 1899 and 1900, and *certified* the same to the clerk of the Jefferson County Court, for the collection of *county taxes thereon by the county of Jefferson.* This ought to have been done, and for an *omission* to do so this proceeding is entirely justified and should be sustained. In no other way can the county of Jefferson obtain the taxes which are by law justly due and owing to it from the Bank of Kentucky, which was in existence and full operation in the city of Louisville, county of Jefferson, both on September 15, 1898, and September 15, 1899, and continuously thereafter until May 1, 1900, as admitted by the answer, and is still in existence, as a corporation, so far as its liabilities and obligations, including its taxes, are concerned.

It is stated in the brief of the learned counsel for plaintiffs in error, the county of Jefferson would have been made a party defendant to the said suit instituted in 1897 by the Bank of Kentucky in the Circuit Court of the United States, had it not been *believed* that, under then existing laws, it could not lawfully collect taxes on property situated within the city of Louisville, but, beginning with the year 1899, the Fiscal Court of Jefferson County, under the decision rendered on May 18, 1899, in the case of *Joyes vs. Jefferson County Fiscal Court, 106 Ky. 615,* levied county taxes on all taxable property inside of the city, as well as outside of the city, in the county, as it should have done and had full power and authority to do theretofore, and such taxes have been so levied and collected ever since.

The real and substantial reason for the failure to make the county of Jefferson a party defendant to the injunction suit of *Bank of Kentucky vs. Stone, et al.,* in the Circuit Court of the United States for the District of Kentucky was the admitted fact that said bank had not obtained any adjudication of any State Court against the right of that county to collect taxes from it under the Revenue Act of November 11, 1892, as it had obtained against the cities of Louisville and Frankfort and the county of Franklin. It would, therefore,

have been in vain to have made the county of Jefferson a defendant to that suit, and sought to enjoin it from collecting its taxes of said bank. There is no good or lawful reason why the Bank of Kentucky should escape the same county taxation, which other corporations and individuals have had to bear under the levies by the county of Jefferson for county purposes for the years 1899 and 1900.

The court's attention is called to a decision of the Court of Appeals of Kentucky, rendered June 19, 1903 (more than six months prior to the decision of the County Court in the case at bar), in the case of *County of Henderson vs. Henderson Bridge Company, 116 Ky. 164,* wherein it is expressly decided that the plea of *res judicata* against Henderson County, interposed by the Henderson Bridge Company in a suit by said county against it for certain taxes due for the years 1893, 1894, 1895 and 1896 was not sustained by showing the record and judgment in favor of said bridge company in a suit against the sheriff of Henderson County, adjudging that said taxes due said county were not due or owing, and perpetually enjoining said sheriff from collecting the same. The county itself was not made a party to the action instituted by said bridge company against its sheriff to have the county taxes for said years adjudged invalid and to enjoin him from collecting the same. In the elaborate opinion in which many authorities are cited, the court below holds in that case that the county of Henderson was in no way bound by the judgment in the action instituted by said bridge company against the sheriff of that county, and reversed the judgment of the court below overruling the demurrer of the county to the bridge company's answer, and dismissing the action of the county against said bridge company to recover said taxes, with directions to sustain the demurrer to so much of said answer as pleaded the former adjudication in bar of the action, and for further proceedings consistent therewith. The court is especially asked to consider the following portions of said opinion (p. 183):

"There are other officers charged with certain duties, ministerial in character, in connection with the collection of taxes, that must be regarded as the representatives of the county if the sheriff can be so regarded. Thus it is the duty of the *assessor* to assess the taxpayers. *But it would not be maintained that a default judgment suffered by an assessor enjoining him from assessing the property of a taxpayer would bar the State or the municipality from proceeding under Section 4241, Kentucky Statutes, to have the omitted property assessed.* It is the duty of the county clerk to copy the tax list and deliver the copy to the sheriff for him to collect on. If a taxpayer were to enjoin the county clerk by a default judgment from copying his list and delivering it to the assessor, this judgment would not conclude the Commonwealth or the county, or prevent it from collecting its taxes.

"None of the tax cases decided by this court touch the question. It is true, suits to test the validity of taxes have been brought in the name of the sheriff, and where the litigation has been conducted *by the State or municipality* in the name of the officer it is bound by the judgment; but the interests of the municipalities of the State, as well as sound legal principles, require that *they should be made parties defendant to actions* against the tax collector, where the purpose of the action is to prevent them from collecting their revenues. For the power to tax involves the power to exist; and their usefulness might be crippled or destroyed if the collection of taxes levied for their support could be defeated by judgments in actions *over which they had no control.*"

In view of this decision, which seems to be controlling and rendered in a case where the facts were much stronger than in the case at bar in favor of the party from whom the taxes were sought to be recovered, it is insisted that the case relied on by the learned counsel for the plaintiffs in error as sustaining the plea of *res judicata,* wherein the county of Jef-

ferson was not a party at all, can not possibly be given the effect contended for by him. In other words, if, in a case where the sheriff of the county is sued and enjoined from collecting county taxes, the judgment can not be pleaded against the county as a bar to the recovery of the taxes enjoined, certainly the judgment in a suit wherein *the county was not made a party at all,* enjoining the collection of *municipal* taxes and taxes in behalf of another county, can not be effectual to bar the proceeding in this case to coerce the assessment of the intangible property of the Bank of Kentucky for *county* taxes in behalf of the county of Jefferson for the years in controversy.

Stress has been laid by the learned counsel for plaintiffs in error on the decision of this court, rendered December 14, 1903, in *Deposit Bank of Frankfort vs. Board of Councilmen of the City of Frankfort, 191 U. S. 499.* But that case furnishes no authority in the case at bar, except upon the second proposition considered in Judge Gregory's opinion, which need not be discussed further here. (R. 19-20.) That case simply decides that, although certain years' taxes were in controversy in the original suit of the Deposit Bank against the city of Frankfort, the main question decided was its contract right to pay under the provisions of the Hewitt Act during its corporate existence. This court took the same view in that case exactly that Judge Gregory had expressed six months before in this case. It will be observed, however, by the court, in the case of *Deposit Bank vs. Frankfort, supra,* it appeared that in all the judicial proceedings relied on as constituting *res judicata* the city of Frankfort was an actual party defendant in the suits brought by the bank, and, of course, was bound and concluded by the judgments in said suits both in the State and Federal courts. In that case counsel for the city of Frankfort failed to set up the fact that the judgment of the Franklin Circuit Court relied on by the bank as *res judicata* had been appealed from and had not, in fact, become final between the parties, when its effect was passed on by the Circuit Court (88 Fed. 986.), and by

this court on appeal. (174 U. S. 800.) The subsequent reversal by the Court of Appeals of Kentucky of the judgment relied on as *res judicata* in that case this court held could not alter the effect of the prior adjudication in the Circuit Court and in this court.

Here, however, the county of Jefferson was never a party, nor a privy to any party, nor alleged to have been, to the action in the Circuit Court of the United States, set forth in the answer herein, and it is not alleged to have been a party or privy to either of the suits brought by the Bank of Kentucky in the State courts prior to the decision by Judge Taft in the year 1898.

The court will observe from the statement of facts in the opinion in the case of *Bank of Kentucky vs. Stone, 88 Fed. 386-388*, that the judgments relied on as *res judicata* by said bank were (1) that of the Franklin Circuit Court in the suit of said bank against Franklin County and R. D. Armstrong, Sheriff; (2) that of the same court in the suit of said bank against the city of Frankfort; and (3) that of the Jefferson Circuit Court against the Judge of the Police Court of the city of Louisville, wherein the latter city made itself a party by appealing in its own name from the judgment of the lower court to the Court of Appeals of Kentucky, where the judgment appealed from was affirmed. In neither of these three cases in the State courts was the State of Kentucky or the Board of Valuation and Assessment, its supposed representative, made a party defendant. The members of that board were for the first time made defendants in the suit brought by said bank in the Circuit Court of the United States for the District of Kentucky, in which action it was alleged (88 Fed. 388), in substance, that said board was threatening, and, unless restrained, would proceed, to value the franchise of said bank in the manner set forth in the act of November 11, 1892, for the years 1895, 1896, and 1897, and certify such value to the County Clerk of Jefferson County to be by him certified to the collecting officer of the city of Louisville, and to the County Clerk of Franklin County to be by him certi-

fied to the collecting officer of the Board of Councilmen of the city of Frankfort and the collecting officer of the county of Franklin. The said board was not made a defendant to the action in the Federal Court as the representative of the State, nor was any relief sought therein as against the State, for the State was content to receive from the Bank of Kentucky its taxes as provided for in the Hewitt Act, and was not threatening to collect less taxes, which it would have received, under the revenue act of November 11, 1892. The members of said board, in other words, were made defendants to the action of the Federal Court simply because they were *assessing* officers, about to assess the franchise of said bank under the act of November 11, 1892, for said years for the use and benefit of the three municipalities mentioned, viz.: the cities of Louisville and Frankfort and the county of Franklin. The real parties in interest were said three municipalities, and they were, therefore, made the chief defendants to said action. The county of Jefferson, as a distinct municipality, also entitled to collect taxes from said bank on its franchise, under the act of November 11, 1892, was nowhere mentioned in the bill of the bank in that case, and no relief was sought therein against that county. Each of the three municipalities made defendants in that action appeared and defended by counsel. The county of Jefferson did not do so. It was, in order to bind them by the judgment in said action, absolutely necessary to make said three municipalities defendants and bring them before the court. Had that suit been against the Board of Valuation and Assessment alone, the decree therein would have had no binding effect whatever upon either the city of Louisville, the city of Frankfort or the county of Franklin. Neither of said municipalities would have been a privy to an action against said board alone. Nor is the county of Jefferson a privy to said action because said board was made a defendant thereto, and appeared and defended said action by the Attorney-General of the State. The county of Jefferson did not appear or defend said action by its County Attorney or any employed counsel. It has not had its day in court in

either of the actions brought by the Bank of Kentucky in the State courts, or the one action brought by that bank in the Federal Court. As the Circuit Court held in *Bank of Kentucky vs. Stone, 88 Fed. 395-6,* said board was, in respect to the prior judgments in the State courts, privy to the cities of Louisville and Frankfort and the county of Franklin. In other words, said board was held to be the mere agent of said municipalities in making assessments on which they levied and collected taxes, and was, therefore, bound by said prior adjudications. But in the case at bar, the learned counsel for plaintiffs in error would reverse this logical order and have this court hold that the county of Jefferson is, in respect to the judgment of the Circuit Court in the case of the *Bank of Kentucky vs. Stone,* privy to said board and thus bound thereby.

The court's attention is particularly called to the 19th clause of the bill of said bank in the case in the Federal Court set out in the opinion of Judge Taft (88 Fed. 388-389). It will be seen from that clause the making of the members of the Board of Valuation and Assessment defendants to said action was purely incidental, the main defendants being the city of Louisville, the city of Frankfort, and the county of Franklin, and these three municipalities alone, it was alleged, would attempt to levy and collect taxes based upon the apportionment of the valuations found by said board in assessing said bank's franchise for the years 1895, 1896, and 1897, the three years preceding the filing of its bill in the Federal Court.

In the *Northern Bank case, supra,* the court, with respect to the appearance of the Attorney-General for the Commonwealth in the litigation in the Court of Appeals of Kentucky in the *Bank Tax Cases, 97 Ky. 590,* decided June 1, 1895, said (p. 418):

> "The fact that the attorney-general appeared on behalf of the Commonwealth in this litigation when it reached the Court of Appeals is not a circumstance which could be held to bind the Commonwealth and all of its

agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases the Commonwealth was a party and the attorney-general was, therefore, present to argue the question on its behalf in those cases. Even if this had not been the case, the case of Carr vs. United States, 98 U. S. 433, shows that the appearance of the attorney-general on behalf of the counties could not bind the State."

Again it is stated (*Ib. 419*):

> "The attorney-general of the State in these cases, in appearing in the Court of Appeals of Kentucky for the county of Bourbon, did not intend to waive any rights of the State, and so far as appeared he had no authority to do so."

Here it is insisted that neither the board of valuation and assessment, nor the attorney-general who appeared for that board in the case of *Bank of Kentucky vs. Stone* in the Federal Court, intended to waive any of the rights of the county of Jefferson, nor did said board or the attorney-general have any power or authority to do so.

At the close of the opinion the court in the case of *Northern Bank of Kentucky vs. Stone, 88 Fed. 427,* states:

> "In view of our conclusion that the complainant has not established as against any of the defendants, except Bourbon County, the existence of an irrevocable contract of tax exemption, either by *res judicata* or on the merits, * * * the order of the court will be that the motion for an injunction against Bourbon County and the certification of the assessment to it by the board of valuation is granted, and to this extent the demurrers to the bills are overruled; but, as to the certifications of the assessments to the other municipalities, the demurrers are sustained, and the bill dismissed."

No appeal was taken to this court from that decision.

Now, it is plain from that decision that, had the county of Jefferson been made a defendant to the suit of the Bank of Kentucky in the Federal Court, the board of assessment would not have been enjoined from certifying its assessment of said bank's franchise to the county clerk of Jefferson County for the use and benefit of that county, because said bank had never obtained a judgment in any action in the State Court, to which the county of Jefferson was a party defendant, adjudging that said bank had an irrevocable contract of tax exemption.

The county of Jefferson can not be held to be a privy to the judgment of the Federal Court in the case of *Bank of Kentucky vs. Stone, supra.* In that case the bill was not framed to enjoin the assessment of said bank's franchise for State purposes, nor was the board of valuation and assessment made a party thereto *as the alleged representative of the State,* nor did the attorney-general undertake to represent said board *as such representative.* In oral argument and in his brief the learned counsel for plaintiffs in error has insisted that the county of Jefferson was a privy under the board of valuation and assessment in the suit of *Bank of Kentucky vs. Stone, supra,* but that contention is untenable and without any decision to support it.

The language of the decree against said board in that case will not admit of the construction the learned counsel for plaintiffs in error seeks to place thereon. It is true said board is enjoined from valuing the franchise of the complainant bank and from certifying such value to the county clerk of Jefferson County, but the connection shows the decree granting such injunction was to prevent said board from valuing the franchise of said bank and certifying such value to said clerk for taxation by the city of Louisville. (R. 14-15.) No injunction was granted in said action against said board from valuing said bank's franchise and certifying such value to said clerk for the use and benefit of the county of Jefferson,

and had there been, it would have been a nullity, as that county was not a defendant to the action, did not enter its appearance thereto, and said board was in no legal sense its official representative.

In this connection the following extract from the opinion in the *Northern Bank case* is instructive (pp. 416-17):

> "The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent, as that relation is usually understood in the law. The State may, through its legislative branch, confer upon, and withdraw from, the counties and cities, power of taxation. But when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by agent for a principal; it is by a *quasi* independent government, for the benefit of the people within its limits. The legislature, if not restrained by the Constitution, may, by contract with individuals, limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof either by the State or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is contending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are to be spent, not for the State at large, but for the convenience and benefit of the people within its limits."

It is true the court in that case further stated (p. 417):

> "We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment *against the State* adjudging a limitation upon the taxing power; but it suffices to say that the question is in some important respects different from the one we have been discussing."

But the State of Kentucky was not sued by the Bank of Kentucky, in either of the cases in the State courts, relied on in the answer, nor in the case in the Federal Court, nor could it be, without its consent.

Further on, Judge Taft in the *Northern Bank case,* in this connection, said (p. 418):

> "We have not deemed it necessary to consider another serious objection which might be urged to the use of a decree against Bourbon County to bar the State and other counties, and that is that, in the absence of power to enjoin the State in a suit, it would be difficult to justify the plea against the State of *res judicata* based on a decree of injunction against a *municipality* or *State agency,* which does not enjoy the same immunity. To give the decree such an effect would seem to violate the State's exemption from suit."

Nothing appears in the suit in the Federal Court to show that said bank ever obtained a judgment against the State holding that it had a contract for tax exemption, in accordance with the provisions of the Hewitt Act, and, therefore, there is no basis whatever for the claim that the county of Jefferson is a privy to the judgment rendered by the Circuit Court of the United States, and afterwards affirmed by this court. Indeed if such a judgment against the State had been obtained by the appellant, Bank of Kentucky, it would not be binding upon the county of Jefferson, unless it had been

made a party thereto. In other words, as stated in the opinion last quoted from, "the county government is a distinct entity from the State government and incurs liabilities of its own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Its taxes are to be spent not for the State at large, but for the convenience and benefit of the people within its limits."

From what has been stated, it is manifest that the Bank of Kentucky was bound to pay taxes to the county of Jefferson under and in accordance with the provisions of the revenue act of November 11, 1892. It was, therefore, required to make report under Section 4092, Kentucky Statutes, on or before March 1, 1899 and 1900, respectively, (dates which *preceded* the passage of the act conditionally repealing the charter of the Bank of Kentucky, approved March 22, 1900), as of December 31 preceding, containing the facts required in the reports of other corporations by Sections 4077-4078, Kentucky Statutes, and the taxes on the assessments of the franchise of said bank, under said Section 4092, became due and payable on or before the 1st day of July next succeeding the filing of such report. This being true, it was unquestionably the duty of the board of valuation and assessment then in office, under the revenue law aforesaid, to assess said bank's franchise for the use and benefit of the county of Jefferson, and of the auditor to certify such assessments to the county clerk of Jefferson County, to be by him certified to the sheriff or "proper collecting officer of the county" of Jefferson, as required by Section 4084, Kentucky Statutes. The said revenue law enjoined the performance of these duties upon these State officials, and there is nothing in the adjudications by the State or Federal courts that prevented the discharge thereof, nor would the members of said board have been in contempt of the Federal Court by performing these acts for the use and benefit of the county of Jefferson. When they failed to do so, it is clear the franchise or intangible property of the appellant, Bank of Kentucky, was *omitted* from assessment within the purview of Section 4241, Kentucky Statutes, so far as the

county of Jefferson was concerned, and was lawfully and properly assessed by the County Court of Jefferson County in this proceeding.

The learned counsel for plaintiffs in error asserts that the authorities cited in the opinion of the court in *Henderson County vs. Henderson Bridge Co., 116 Ky. 164,* uphold his contention that the county of Jefferson as a *privy* is bound by an adjudication against the board of valuation and assessment. Not one of the cases there cited does so. In that part of his opinion, Judge Hobson states (p. 178):

> "The ground upon which a municipality is held bound by a judgment against certain of *its* officers is that these are *its legal representatives who are by law authorized to speak for it and control its affairs.*"

Now, can this be said of the board of valuation and assessment? Certainly not.

Further, the court in that case said (p. 179):

> "In none of the adjudged cases has the municipality been held bound by a default judgment against any of its officers, *except those who had charge of its affairs as its chief managing agents.*"

Did the board of valuation and assessment, in any legal sense, have charge of the affairs of the county of Jefferson as its chief managing agent? Unquestionably it did not.

After reviewing the cases relied on by the bridge company in that case, the court further said (p. 180):

> "In all the cases where the judgment against the officer was held a bar his official act, without the judgment, would have bound the municipality."

Let us employ that test here. Suppose the board of valuation and assessment had itself passed on the claim of the

Bank of Kentucky to exemption from certain taxes, or on its plea of *res judicata* as against the county of Jefferson, and sustained such claim or plea, and for that reason had refused to assess its franchise for county taxation, would the county of Jefferson be bound thereby, and left remediless? Not by any means. Indeed, this precise question was decided by the lower court in *Stone, Auditor et al. vs. City of Louisville, 22 Ky. Law Rep. 423.* In that case said board had decided that the Germania Safety Vault & Trust Company, which had paid its taxes to the State under the Hewitt Act, was exempt from all local taxation, including those levied by the city of Louisville, and for that reason refused to assess the franchise of said trust company for the years 1895 and 1896. The city of Louisville then brought its action in the Franklin Circuit Court against said board, to which said company was made a party defendant, for a writ of mandamus to compel said board to make an assessment of said trust company's franchise for the years mentioned, and the auditor to certify the same to the county clerk of Jefferson County as required by the revenue act of November 11, 1892. This relief was granted by the court below, which adjudged said trust company had no contractual exemption from local taxation under the Hewitt Act, and that judgment, on the appeal by said board and trust company, was affirmed by the Court of Appeals. It was further held in that case that said board had the power to make a retrospective assessment of the franchise of any corporation coming within the purview of the revenue act of November 11, 1892.

So we see the decision of said board in that case holding said trust company was exempt from local taxation on its franchise was held not to have the slightest binding effect upon the city of Louisville. In other words, the court there held the official act of said board did not bind the city, nor would a like act bind the county, and we have seen, where such is the case, a judgment against said board alone will not bind the county.

It is incorrect, therefore, to say, as does the learned counsel for plaintiffs in error, that "if the county of Jefferson had attempted by mandamus to compel the State Board of Valuation and Assessment to make an assessment and certification (in its behalf), it could at once have pleaded this decree (in *Bank of Kentucky vs. Stone, 88 Fed. 398*) as a complete defense." That decree in such a proceeding would have been no defense, as it is not in this alternative proceeding, under Section 4241, Kentucky Statutes, for a retrospective assessment of said bank's franchise for the use and benefit (in one aspect) of the county of Jefferson.

Again, the learned counsel for plaintiffs in error, to sustain his contention that the board of valuation and assessment is the official representative of the State, the counties, the cities, towns and taxing districts, all of which would be bound by an adjudication against said board alone, uses as an illustration the Louisville & Nashville Railroad Company, whose franchise is assessed by said board and the value thereon is certified by the auditor to the several county clerks of the counties through which its lines of road in Kentucky are operated, for re-certification to the collecting officers of the cities, towns and taxing districts (hundreds in number) in such counties, according to mileage, and asks, where that company desired to raise a question before said board as to whether certain of its property is taxable or how taxable, or where that company claimed to have a contract with the State similar to the Hewitt contract, under which it was bound to pay taxes to the State and not to the local communities or municipalities—if it would be necessary, in such a test suit, to make all of the counties, cities, towns and taxing districts parties defendant?

If it was only desired to have the court construe the law and set a precedent, the question may be answered in the negative; but if the object was to determine the rights of the company as against each municipality or taxing authority capable of being sued, not only for the taxes immediately involved, but those thereafter levied, it would be necessary

to make them defendants to the action. Then the final judgment therein would establish an effective plea of *res judicata* —not otherwise.

It is clear that the learned counsel of the plaintiffs in error was of this opinion when he brought the suits for his client, the Bank of Kentucky, in the State and Federal courts against the cities of Louisville and Frankfort, and the county of Franklin. It would seem the making of any or all of said municipalities parties defendant, which he took care to do, was a work of supererogation on his part, if his present theory be correct that it is only necessary to make said board a party defendant to such an action in order to conclude the rights of all interested municipalities in such tax controversies. The fact that the persons whose rights are to be affected are numerous can not obviate the legal necessity of making them defendants to the action and bringing them before the court.

Equity Rule 48 provides, where the parties are numerous on either side, a plan of procedure in such cases which dispenses with the necessity of bringing all of them before the court. So, Section 25 of the Civil Code of Kentucky makes this provision:

> "If the question involves a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

The county of Franklin, which was made a defendant to the injunction suit in the Federal Court, did not represent a common interest of all counties, but stood on a different footing from the county of Jefferson, which was not made a defendant thereto, for the former county had been adjudged by the Franklin Circuit Court in a suit brought by the Bank of Kentucky not entitled to collect a tax on the franchise of said bank, while there was no such adjudication in any court against the latter county, the only other municipality entitled

by law to collect its taxes on said bank's franchise or that was a necessary defendant to that suit.

This court in *Apsden vs. Nixon, 4 How. 467,* described the essential conditions of *res judicata* as follows:

> "A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction, upon the same subject-matter, between the same parties, for the same purpose."

A person not a party, and without right or opportunity to appear and defend, is not bound by the judgment. (*Hale vs. Finch, 104 U. S. 265.*)

The matter put in issue, the thing decided, in the case of *Bank of Kentucky vs. Stone,* was the effect to be given to the judgments of the Franklin Circuit Court in the two suits brought by said bank, one against the county of Franklin and R. D. Armstrong, sheriff of that county, the other against the city of Frankfort, and the judgment of the Jefferson Circuit Court against the city of Louisville, enjoining said municipalities, respectively, from levying and collecting taxes on the assessment by the board of valuation and assessment of said bank's franchise, and adjudging, as between the parties to said suits, that said bank had a valid and subsisting contract with the State to pay taxes only in accordance with the Hewitt Act. The Circuit Court, in the opinion delivered by Judge Taft, gave to these judgments the effect of a bar or estoppel against any claim by either of said three municipalities to levy and collect such taxes from said bank during its corporate existence, and, on that account, enjoined said board from making any further assessments of said bank's franchise for taxation by either of said three municipalities.

It is plain the thing decided there was not the thing to be decided in the case at bar—the parties are not the same, and the issue formed is different. No effect is to be given by the court in this case to a former judgment in the State Court

against the county of Jefferson involving its right to levy and collect its taxes upon the franchise of said bank for any year, for no such judgment was ever rendered against that county.

The question whether the Court of Appeals of Kentucky refused to give full faith and credit or due effect to the judgment of the Circuit Court of the United States for the District of Kentucky relied on in the answer of the plaintiffs in error, it is conceded is a Federal question within the jurisdiction of this court, but it is important in determining that question to keep in mind the rule which this court has established by which such faith and credit or effect must be measured. Judgments of United States Circuit Courts, sitting in particular States, in the courts of such States are to be accorded such effect only as is accorded in similar circumstances to judgments and decrees of a State tribunal of equal authority—nothing more and nothing less. (*DuPasseur vs. Rochereau, 21 Wall. 130; Metcalf vs. Watertown, 153 U. S 671; Hancock National Bank vs. Farnum, 176 U. S. 640.*)

In *DuPasseur vs. Rochereau, supra*, this court said: "The only effect that can be justly claimed for a judgment in the Circuit Court of the United States is such as would belong to judgments of the State courts rendered under similar circumstances. * * * It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If by laws of the State a judgment like that rendered by the Circuit Court would have a binding effect as against Rochereau if it had been rendered in a State court, then it should have the same effect, being rendered by the Circuit Court."

In that case it appeared that the judgment had been rendered by the Circuit Court of the United States for Louisiana on a vendor's privilege and mortgage declaring it to be the first lien and privilege on certain land, and the marshal sold the property clear of all prior liens; the mortgagee pur-

chased, and paid into court for the benefit of subsequent liens the surplus of his bid beyond the amount of his own debt. That judgment and sale were set up by way of *defense* to a suit brought in the State Court by another mortgagee who claimed priority to the first mortgage and who had not been made a party to the suit in the Circuit Court. The State court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to this court by writ of error, and this court held that the State Court did not refuse to accord due force and effect to the judgment; that such a judgment in the State courts would not be conclusive on the point in question, and the judgment of the Circuit Court could not have any greater force or effect than judgments in the State courts.

In *Metcalf vs. Watertown, supra,* Mr. Chief Justice Fuller, in delivering the opinion of the court, said (p. 676): "It can not be doubted that in respect of their effect under Section 905, the judgments and decrees of the Circuit Courts of the United States are enitled to the same sanctity and effect in the courts of each State, when those courts are held within the the State, as their own judgments—nothing more, but nothing less."

The question of what effect should be given to the judgment in *Bank of Kentucky vs. Stone,* relied on as *res judicata,* was one of general law to be passed on by the Court of Appeals of Kentucky, so far as that judgment was sought to be made a bar to the rights of the county of Jefferson, and the latter court, in that respect, gave to said judgment the same effect and only the same effect as it would, had said judgment been rendered by one of the courts of that State, and that effect was simply to hold, that said county was not bound thereby, not having been a party nor privy to any party to the litigation in which it was rendered.

It can not be doubted, in the light of the decision in the case of *County of Henderson vs. Henderson Bridge Co., supra,* that the Court of Appeals of Kentucky, in the case at bar,

accorded to the judgment of the Circuit Court in *Bank of Kentucky vs. Stone,* relied on as *res judicata* in the answer, the same force and effect—"nothing more, but nothing less"—upon the rights of the county of Jefferson, as it would have accorded to it if it had been rendered by a tribunal of that State of equal authority or co-ordinate jurisdiction, in a like case under similar circumstances.

For the foregoing reasons it is submitted that there is no error in the judgment of the court below in respect to the taxes adjudged in behalf of the county of Jefferson.

II.

STATE TAXES.—THE PROVISIONS OF THE HEWITT ACT.

At the outset of the discussion of this branch of the case, it is believed the court will be interested and better informed as to the questions involved therein by reading the able opinion of the judge of the County Court, adopted by the chancellor of the Jefferson Circuit Court, and affirmed by the Court of Appeals, which is as follows (R. 20-23):

> "The remaining question involves the determination of the extent and nature of the State's rights and remedies with reference to its tax claim of 1900, which it is admitted has never been paid. It is claimed on behalf of defendant's counsel, that the property in question, having belonged to the Bank of Kentucky, was, during the time of such ownership, to wit, until May 1, 1900, only assessable under the Hewitt law, but having disposed of it prior to July 1, 1900, which, it is claimed, was the assessment day under the Hewitt law, it could not be assessed against the Bank of Kentucky for 1900, and not becoming the property of the National Bank of Kentucky until May 1, 1900, could not be properly assessed against it until Sep-

tember 15, 1900, and then only for 1901 taxes. If this contention be correct, it suggests a woeful and inexcusable defect in our tax legislation. After a careful examination of both the Constitution and statutes upon the subject, the court is strongly of opinion that no such yawning gap in the law exists, and that such a conception arises from the practical difficulty of fixing liability and probable omission of the property from assessment rather than any lack of authority or right to make assessment or enforce collection.

"Under Section 4241, Kentucky Statutes, it is made the duty of the County Court in cases of this nature to enter an order fixing the value of the property, 'if it shall appear to the court that the property is liable for taxation and has not been assessed.' It is admitted, that this property has not been assessed and that it is liable for taxation (except by reason of a supposed hiatus in the law, failing to provide for its assessment for this particular year under the circumstances alleged).

"By act of the legislature, Section 4019, Ky. Statutes, and pursuant to mandates of the Constitution of Kentucky, 169-174, inclusive, an annual tax is levied upon all property not exempt from taxation. It is not claimed that any of the property in question was exempt, but merely that it was assessable under the Hewitt law of 1886. Under the Hewitt law an annual tax is likewise levied. Therefore the tax for 1900 was levied on the property in question; it matters not, so far as the lien created by the levy is concerned, how many times or when it changed hands, it remained in the Commonwealth the entire fiscal year 1900, *i. e.*, July 1, 1899, to July 1, 1900 (see Constitution of Kentucky, Section 169), and received the protection of her laws during that entire period. The question as to when the assessment day was, or who was the owner on that day, affects merely the question of *personal* liability and not that of the right of the Commonwealth to proceed against the property. While the

immunity from personal liability for taxes undoubtedly exists in favor of any one who acquires and disposes of property between assessment days, even though the ownership extend over a period of 364 days, the liability of the property, it remaining in the Commonwealth the entire year, is absolutely indisputable. The particular person against whom it is assessed is utterly immaterial, except for the purpose of fixing the personal liability, advising the party in interest as to the extent of liability, and furnishing a practical and convenient means of collecting the tax without coercive sale of the property itself. Kentucky Statutes, Section 4056. Under the broad and imperative mandate of both the Constitution and statute, the property is made liable absolutely and at all events (unless of a class exempt from taxation). The fact that by change of ownership or omission from assessment property may as a practical proposition escape taxation, in no wise relieves it from liability or lien, even though it be difficult or impossible to say, as between the various persons who have owned it, which should pay the tax. Assuming that July 1, 1899, was the assessment day for 1900 tax on this property, that it was acquired from an individual July 2, 1899, and that on September 16, 1899, it was transferred back to an individual, according to defendant's contention the bank would not have to pay 1900 taxes, because its assessment day was July 1st, when it did not own the property, and the individual would not have to pay because on September 15, 1899, his assessment day, he did not own it, yet between them it had been owned the entire year. In the same way the individual could sell to this bank or some other having the same assessment day any time from July 2d to and including September 14th, and the bank re-sell to this or some other individual any time from September 16th to and including June 30th without liability, and so on *ad infinitum*, thereby permanently depriving the State and other governmental institutions of any return whatever in ex-

change for the protection extended such property. It is not sufficient to say that such practice would be a fraud, and therefore disallowed. It would be entirely possible for such sales to be made in the utmost good faith, and, considering the long intervals between the two assessment days, it would be entirely possible for such transactions to be effected not only in good faith, but with great frequency and upon a very large scale. The apparent immunity of even actual exemption of both such parties from personal liability would afford no answer to the proposition, nor would it prove at all effectual to prevent the enforcement of the *property's liability*, by virtue of the lien created by the levy.

"Take the converse of the proposition, and an equally unjust and untenable conclusion is reached. An individual buys this property September 14th and sells it to this bank any time before the following July 1st, and, according to the rule that assessment day fixes the liability for a tax, the individual would have to pay because he was the owner September 15th, and the bank would have to pay because it was the owner July 1st, and so on, if they or others similarly situated would continue to make such sales between September 15th and July 1st, and between July 1st and September 15th, the same property would have to be charged with taxes *twice* in each year. If it were at all necessary, to the enforcement of the lien, that the property should be assessed against some one, or to charge some one with primary or personal responsibility, this difficulty would be of easy solution by charging the one who owned it, at the conclusion of the fiscal year (June 30th), on the ground that the property was in lien when he obtained it for a portion of the year's protection it had received, and that he himself was the immediate beneficiary of the remaining year's protection, thereby completing the full benefit accruing to him and his property, in exchange for which the governing power exacts its taxes from him personally, or, in any event,

from the property. Or, if necessary, assessment might be made in the names of both or all who had owned the property during the fiscal year.

"That the Commonwealth has a lien upon this property, or at least an inchoate lien, which is perfected by the assessment when made, even though retroactive, seems to the court to admit of no serious doubt. Under Section 4021, Kentucky Statutes, such lien is expressly declared with reference to the property assessed, and in the same section provision is made for retroactive assessment, with the limitation in such a case that 'the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime.' It can not be claimed that defendant, National Bank of Kentucky, comes within this exemption, in as much as it affirmatively appears that the two chief officers of that bank, at the time of the transfer of assets, held corresponding positions with the Bank of Kentucky during the time the 1899 and 1900 taxes accrued or became assessable, they, and the National Bank of Kentucky through them, being thereby chargeable with notice of this unpaid and unassessed claim for tax and the inchoate lien therefor, taking said assets *cum onere*.

"In the case of *Board of Councilmen of Frankfort vs. Mason & Foard Co., 100 Ky. 54*, the Court of Appeals expressly held that a claim of the city for taxes existed whether the taxpayer's property had been assessed or not, if it were liable for assessment, and that such claim was not only a subsisting liability against him, but a lien upon his property.

"Again, giving to the contract established by the Bank of Kentucky under the Hewitt law the utmost effect that could possibly be claimed for it, it could not possibly be extended so as to cover the liability of this property for 1900. For the Hewitt law to have applied, under the view of the defendant's counsel as to assessment day, the property would have had to be owned July 1, 1900, by the

Bank of Kentucky or some other bank having a similar contract. The bank would have had to make its report and pay the tax as provided by that law, or under Section 7 have lost its special immunities and become subject to taxation as other individuals or corporations. The record shows no report was made or tax paid for 1900. The fiscal year 1901 being from July 1, 1900, to June 30, 1901, it is seen that the Bank of Kentucky did not own this property for any part of that fiscal year, but it is admitted that it was not only in existence in this State during the whole of that year, but continuously from and before September 15, 1899, the assessment day for property generally. At the close of the fiscal year 1899, to wit, June 30, 1900, the Hewitt law became *functus officio*, so far as its effect upon actual tax payments on *this property* was concerned, but (not covering or applying to any part of the tax for the fiscal year 1900) it afforded immunity neither against assessment nor payment for that year, and this property, so far as assessment or liability for 1900 taxes was concerned, was as much liable to assessment for that year under the act of 1892, as if the Hewitt law had never existed. It was doubtless omitted from assessment as of September 15, 1899, or December 31, 1899, upon the idea that the bank would on July 1, 1900, by compliance with the Hewitt law bring the property under the operation of that law, but, having failed to do so, Section 7 of the Hewitt law becomes at once operative and relates back to the assessment day under existing law, removing every vestige of immunity or exemption that might have been claimed under the Hewitt law, and assessment made under the act of 1892 of this bank's assets would undoubtedly have been as binding under the facts shown by this record, as the assessment made for 1901, or any subsequent or previous year, and not having been made, the property was omitted, and being liable, it becomes the imperative duty of the court under Section 4241 to enter an order fixing the value thereof."

In discussing the liability of the Bank of Kentucky for State taxes for the fiscal year 1900, it is admitted by its counsel and shown by the record herein that it has paid *no* taxes to the State in any form under the Hewitt Act, or otherwise, since July 1, 1899. In other words, by the plan adopted by it of reorganizing as a national bank, it seeks to evade entirely State taxes for one whole year. The last State taxes were paid by it on that date and were for the preceding fiscal year, ending June 30, 1899, and the first State taxes the National Bank of Kentucky paid were in and for the fiscal year ending June 30, 1901. Neither bank has paid any taxes whatever to the State for the fiscal year 1900. It is believed that this court will be, therefore, very much disinclined to allow any plea of plaintiffs in error herein to prevail that will have the effect of permitting property of the value of more than two and a half millions of dollars to escape State taxation for one whole year, unless compelled to do so by the imperative provisions of the law. After providing the manner in which banks may acquire the right to pay taxes at the rate of seventy-five (75) cents on each share of stock to the State, and the ordinary rate of State taxes on surplus in excess of ten (10) per cent. of the capital stock of each bank, Section 7 of the Hewitt Act (*General Statutes, Edition of 1888, p. 1041*) provides as follows:

> "If any bank, State or national, shall *refuse* or *fail* to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section four, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section two of this act, and the *same* taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals."

Under this provision, wherever there is either a *refusal* or *failure* to pay the rate of taxes fixed by the Hewitt Act, then the value of the shares of stock, surplus, etc., of the bank must be assessed and pay taxes, State, county, and municipal, according to the *rates* imposed on the assessed taxable property in the hands of individuals. It is insisted that the Bank of Kentucky, or its transferee, the National Bank of Kentucky, in its behalf, for the year 1900, did *fail* to pay taxes at the *rates* fixed by the Hewitt Act, according to its alleged agreement and the judgment in *Bank of Kentucky vs. Stone, supra*, holding, as between the parties to that action, it had a contract to do so; and, in that same contract, the Hewitt Act, the statute relied on, expressly provided by Section 7 that a *failure* or *refusal* brought the property of the bank upon the same level as the property of individuals, or other State banks, and it must pay State, county, and municipal taxes accordingly.

In the brief and oral argument it was insisted by the counsel for plaintiffs in error that the Bank of Kentucky was not *assessed* nor bound to pay taxes for 1900 until July 1, 1900, and, having reorganized and become a national bank prior to that date, no liability by way of lien or otherwise rested upon the *assets* or *property* which it had turned over to the National Bank of Kentucky for State taxes, after May 1, 1900. This proposition is unsound. It is maintained for defendant in error that the owner of *property* located within the State of Kentucky, by a transfer thereof to another, can not evade the taxes owing to the State thereon, it being at the time under *lien* therefor by the express letter of the statute. It is furthermore insisted that, on September 15, 1899, the property and assets of the Bank of Kentucky came under this statutory lien for the amount of taxes levied and fixed by law for *State* purposes. It is true that Section 2 of the Hewitt Act (*General Statutes, Ed. of 1888, p. 1040*) provides that the *payment* of State taxes by banks shall be made on the 1st day of July in each year, but that is merely *pay day*. It is not *assessment* day, nor the day when the property and

assets of the bank became liable for State taxes for the fiscal year beginning July 1, 1899, and ending June 30, 1900 (*Section 169, State Constitution*). In other words, the National Bank of Kentucky took the property of the Bank of Kentucky *cum onore*, and this obligation to the State can not be discharged *until the taxes are actually paid for that year.* On account of the *failure* or *refusal* to pay taxes for the year 1900, under the Hewitt Act, the provisions of Section 7 became enforcible, and the *same rate* of taxes must be paid to the State as on assessed taxable property in the hands of individuals, that is to say, *under existing laws at the time of such failure or refusal*, and those laws were embodied in the General Revenue Act of November 11, 1892. By that act (*Section 4019, Kentucky Statutes*), the levy for State purposes was fifty-two and one-half (52½) cents on each one hundred dollars for three years, and afterward forty-seven and one-half (47½) cents on each one hundred dollars. This levy was upon all property directed to be assessed for taxation, and this, of course, would include the property of the Bank of Kentucky, whether tangible or intangible.

Under Section 4023, September 15th of each year is assessment day and the day on which all property becomes liable for State taxes. It is as follows:

> "*The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property, on the fifteenth of September of the year the assessment is made*, shall be *liable* for the taxes thereon."

By Section 4021, Kentucky Statutes, it is provided:

> "The Commonwealth, and each county, incorporated city, town and taxing district, shall have a *lien* on the property assessed for the taxes due them respectively, *which shall not be defeated by gift, devise, sale, alienation, or any means whatever*, unless the gift, devise, sale or

alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively, in the manner provided for by law, for that year, at any time not later than five years thereafter; but the *lien* thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

By Sec. 2, Art. 1, of the Hewitt Act, it is provided (*Ib.* p. 1035):

"The Commonwealth shall have a lien for all taxes, and the counties for the county levy and other taxes due the county, on the property assessed, and *on all other property* of each person, which shall not be defeated by gift, devise, sales, alienation, or any means whatever: *Provided*, The lien herein provided for shall not exist longer than five years."

Thus it will be observed the statutory lien rests not only on the property assessed, but "all *other* property of each person," which can not be defeated by a transfer such as is disclosed by this record.

Again, Section 4052, Kentucky Statutes, provides:

"*All taxable estate* shall be assessed and valued *as of the fifteenth of September* in the year listed, and the person owning or possessing the same *on that day* shall list it with the assessor and remain bound for the tax, *notwithstanding he may have sold or parted with the same.*"

Section 6, Art. 1, of the Hewitt Act (*Gen. Stats. Ed. 1888, p. 1035*) is as follows:

"The holder of the legal title and the holder of the equitable title, and the claimant or bailee in possession of

property on the fifteenth of September, shall be liable for the tax on it to the Commonwealth."

Language could not be stronger than this to fix the *liability* of the Bank of Kentucky, *as of September 15, 1899, for the year 1900.* Under the decisions of this court it makes no difference whether the property is *actually assessed* or not, the *liability* for the tax attaches under the statute and is fixed, and there can be no escape therefrom, unless it is not retrospectively assessed within five years, where the same has been *omitted* from the regular assessment.

In *Board of Councilmen of Frankfort vs. Mason & Foard Co., 100 Ky., 54,* the court said:

> "It is not a debatable question that, at the time the charter of the cities of the third class was passed, that a claim of the city for taxes, whether the taxpayer's property had been assessed, or when it was liable to assessment, though omitted, was a liability subsisting against such taxpayer, and for such liability a *lien* existed on his *property.* The mere fact that a mistake of the assessor or of the taxpayer, or by the *design* of either or both, property liable to taxation was omitted from the assessment, does *not* destroy the taxpayer's liability to pay taxes. The liability to pay subsists as much as in a case where the assessment is made. When the tax *levy* is made the *liability* accrues."

Here the tax levy for State purposes was made by the statute of November 11, 1892, for that year and all succeeding years until the passage of the Act of May 8, 1897, and the subsequent General Revenue Act of March 29, 1902. (Section 4019, Kentucky Statutes.) In other words, the levy for State purposes on the property and assets of the Bank of Kentucky had been made by statute long prior to September 15, 1899, and at that date (or at least on December 31, 1899, under Section 4092, Kentucky Statutes), attached and

became a *lien* thereon, and for the State taxes for the year ending June 30, 1900, there exists a lien until the same are paid or discharged, and this lien can not be discharged or evaded by a mere transfer of the property under lien from one bank to another; and, in any event, it was the duty of the plaintiff in error, the Bank of Kentucky, its president and cashier, to give in the report of the shares of stock and surplus of the Bank of Kentucky, on or before March 1, 1900, as of December 31, 1899, so that the taxes for that year might be paid to the State on July 1, 1900. This they failed or refused to do. Hence it is insisted that there has been an omission to assess, or to list for taxation, and the only remedy left to the Commonwealth, in order to obtain its taxes for the year 1900 on the value of the assets of said bank, is by this identical statutory proceeding to coerce such assessment for that year. Otherwise, we have the anomalous condition of having more than two and a half million dollars' worth of property, *subject to taxation,* escape all State taxation whatever for the year 1900. No construction of the statutes involved herein can be justified which allows this unjust thing to be done to the State.

The report required from a bank under the Hewitt Act to the auditor of public accounts on July 1, in each year, was intended to form merely the basis upon which the taxes to the State for the *preceding fiscal year* were to be paid. In other words, July 1 is "pay day" by the provisions of said act, and, in default of paying upon that day, Section 7 of Article 2, of that act (*Gen. Stats., Ed. 1888, p. 1041*) provides, if the bank, State or national, shall refuse or fail to pay the tax imposed by said act that the shares of stock of such bank and its surplus, undivided accumulations, and undivided profits shall be assessed as provided in Section 2 of said act (article), and the same taxes, State, county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits and undivided accumulations, as are imposed on the assessed taxable property in the hands of individuals.

The plaintiff in error, National Bank of Kentucky, was made a party to this action because it acquired in its organization the property and assets of the Bank of Kentucky, which were under lien to the Commonwealth for the taxes for the year 1900. As Judge Gregory well states, its property and assets were taken by the latter bank *cum onere*, that is, subject to the lien for the taxes owing to the Commonwealth for the fiscal year ending June 30, 1900.

By Section 7, Article 12, of the Hewitt Act (*Ib. 1089*), the said act took effect from and after *September 14, 1886*. This was provided so that assessment day, September 15, 1886, would be the first day to which the provisions of said act applied, and that date was assessment day for the next fiscal year succeeding the passage of said act, ending June 30, 1887. So that when banks paid taxes for the first time, under the provisions of Article 2 of said act, on July 1, 1887, they paid the taxes for the fiscal year ending June 30, 1887, and not for the succeeding fiscal year ending June 30, 1888, as was intimated by the learned counsel for plaiatiff in error in the oral argument of this case in the court below, and a doubt on that point is suggested in his brief in this court (p. 27).

It is alleged in the statement of the Commonwealth herein that neither of said banks paid the taxes due the State for the year 1900. (R. 4-5.) The answer denies that any such taxes "ever due" have not been paid (R. 8-9), which amounts merely to a conclusion of law on the part of the pleader. There is no affirmative plea of payment to the State of the taxes in controversy. The said allegation in the statement of defendant in error, therefore, stands confessed by plaintiffs in error.

By an act approved April 24, 1882 (*General Statutes, Ed. 1888, p. 652*), the fiscal year was defined as follows:

> "The present fiscal year shall close on the 30th day of June, 1882, and thereafter the fiscal year shall begin with the 1st day of July and close with the 30th of June fol-

lowing, and all regular reports and statements of accounts required by law of the various offices of State shall be made accordingly."

This act was followed by the present Constitution adopted September 28, 1891, which declares (*Section 169*):

> "The fiscal year shall commence on the 1st day of July in each year, unless otherwise provided by law."

Unless banks paid taxes for the fiscal year ending June 30, 1887, on July 1, 1887, they escaped taxation altogether for the fiscal year ending June 30, 1887. So the "pay day" fixed for the payment by banks on July 1, in each year, was for the payment of taxes for the *preceding* fiscal year, and not for the *succeeding* fiscal year. This is clear from the provisions of the Hewitt Act with respect to the assessor and his duties, contained in Article 6 of said act. (*Ib. pp. 1053-1062, Secs. 1 to 13.*)

The State revenue on assessments as of September 15, 1886, under the Hewitt Act, became collectible by the sheriff on the 1st day of May of the following year, and by the 1st day of November in the following year he was required to pay to the State treasury all the taxes he had collected for the year 1887, and so on each year. (*Ib. Sec. 9, Art. 9, p. 1075.*) The same system has obtained since, and the court below judicially knew that the sheriff never begins to collect the State revenue until about August for the preceding fiscal year ending June 30. There is nothing peculiar in the fact, therefore, that taxes from banks under the Hewitt Act were required to be paid on July 1 for the preceding fiscal year ending on June 30, but it would be a forced construction, and one not at all warranted by the facts or anything contained in the record of this case, or in the existing revenue laws at that time, to hold that, when banks paid taxes on July 1 of any year, it was for the *succeeding*, and not for the *preceding* fiscal year.

But to place this question beyond controversy, the court's attention is called to Section 5, Article 2, of the Hewitt Act, which reads as follows (*Ib. p. 1041*):

> "The said banks may take the proceeding authorized by Section 4 of this act (article) at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in Section 1, *from the passage of this act.*"

The word "passage" must be construed as equivalent to the words "taking effect," for no tax could be lawfully collected under said act until it took effect. Its passage was on May 17, 1886 (*Ib. p. 1034*) but it did not take effect until September 14, 1886. (*Ib. Sec. 7, Art. 12, p. 1089.*)

Of course, no tax was paid by the Bank of Kentucky, under the provisions of said act on July 1, 1886, before it took effect, nor until after said bank had accepted the same. Now, when was that done? The answer states (R. 10):

> "As a condition to its operation, the said act, in the 4th Section thereof, provided for a certain consent to be given by the stockholders of the said bank. This consent was given strictly in accordance with the said law by the stockholders of the Bank of Kentucky *on June 25, 1887.*"

So the first payment of the tax to the State by the Bank of Kentucky, under the Hewitt Act, was necessarily on July 1, 1887, and, as Section 5, Article 2, of that act made the payment of the tax "*from* the passage of this act," or, as we have seen, from the taking effect thereof, a condition precedent to the conferring of the privilege therein provided for, this first payment on July 1, 1887, was for the preceding fiscal year reaching back and covering the date when said act took effect. In other words, the first payment was for the fiscal year ending June 30, 1887. So, each succeeding payment was for the preceding fiscal year ending the day before July

1, the "pay day." This is further manifest by the following admission in the answer (R. 10):

> "The said Bank of Kentucky made the report under said act and paid the taxes thereunder *for every year from July 1, 1886, to July 1, 1899, both inclusive.*"

This being true, it is a demonstration that the first payment of taxes on July 1, 1887, to the State, under the Hewitt Act by the Bank of Kentucky, was for the year "from July 1, 1886," the preceding fiscal year, and so on, each annual payment of such tax thereafter was for the preceding, and not for the succeeding fiscal year.

There can not be the slightest doubt, upon an inspection of the record that the intangible property of the Bank of Kentucky, if its contentions are sustained by this court and the judgments of the courts below are reversed, will have escaped the payment of any State taxes whatever for the fiscal year ending June 30, 1900.

The learned counsel for plaintiffs in error advances the unsound argument that, because the charter of the Bank of Kentucky was conditionally repealed by the act of March 22, 1900, and on May 1, 1900, it ceased to do business or to exercise the banking privileges granted by its charter, it could not make its report on July 1, 1900, as required by the Hewitt Act, and the property it had transferred to the National Bank of Kentucky was not, therefore, liable for State taxes for the year ending June 30, 1900. Now, it must be borne in mind that the Bank of Kentucky did not, by reason of said repealing act, cease to exist as a corporation on May 1, 1900. On the contrary, for all purposes of winding up its affairs, collecting claims due it, paying its debts and liabilities, suing and being sued (as it has been in this case), it still exists as a corporation, notwithstanding said repealing act. It was entirely within its power and it was its duty, by its president or cashier, made defendants to this action, and who continued in the same capacities as officers of the new bank, the National Bank

of Kentucky, to have made the statutory report and paid the taxes due the State on July 1, 1900, for the fiscal year ending June 30, 1900. Because this property merely changed hands did not relieve it of State taxes, and if the National Bank of Kentucky did not choose to make the report for its assignor, the Bank of Kentucky, either as of December 31, 1899, or July 1, 1900, and pay the taxes due the State in accordance with such report for the year ending June 30, 1900, it can not be heard to complain that the property it thus acquired shall not be retrospectively assessed, as omitted property, and made to bear the taxes which should have been paid to the State as of July 1, 1900. The National Bank of Kentucky, it must be remembered, paid taxes for its shareholders on their shares of stock for the fiscal year ending June 30, 1901, having been assessed therefor as of December 31, 1900, for the first time, and these taxes, which were due and payable July 1, 1901, were likely paid some time in the summer or autumn of 1901. Neither the Bank of Kentucky nor its assignee or transferee having paid the taxes due the State for the fiscal year ending June 30, 1900, it was required by the express provisions of the Hewitt Act to pay taxes on all of its property, tangible and intangible, as individuals were required to do, and that is what the County Court, the Circuit Court and the Court of Appeals of Kentucky have all adjudged and required it to do in this proceeding.

The learned counsel for plaintiffs in error, in oral argument, urged that no taxpayer was liable for taxes where he had disposed of his property before assessment day, and as the Bank of Kentucky had disposed of its property to the National Bank of Kentucky before July 1, 1900 (assessment day, according to his theory or construction of the State statutes), *it* was not liable for taxation; but he overlooked the fact, and failed to state to the court, even if his theory were otherwise correct, that, while the *individual* liability might thus be escaped, the *property* itself, the *thing* taxed, could not escape liability by such a transfer. So here we have

made both banks parties defendant, one as the former owner and the other as the present owner, acquiring the property while the former was liable for the State taxes and its property under lien therefor. This proceeding is *in rem* as well as *in personam*. The Commonwealth is seeking to have assessed the property that has been liable for its taxes for the year 1900 all the time, and the mere fact that it has been put into the hands of a national bank does not relieve that property or the assets thus transferred from the claim for State taxes for the year 1900.

Oscar Fenley, president of the old as well as the new bank, testifies that the stockholders in the old bank received exactly the same stock in the new bank, the assets of the old bank were received by the new bank, the banking business was carried on by the latter in the same manner and at the same place as by the former, and practically the same assets, having the *same value*, were held by the new bank on July 1, 1900, as were held by the old bank during 1899 and at the time of the transfer or May 1, 1900. (R. 33-36.)

In the case of *City of Middlesboro vs. Coal & Iron Bank, 108 Ky. 680*, the court below upheld the lien of the city for taxes on the franchise of said bank (under the State board's assessment thereof) against real estate which had been owned by the bank, and sold under a decretal sale in a suit to which the city was not a party, and which suit had been instituted by the Commonwealth to wind up the affairs of the bank. In other words, the court upheld the statutory lien for taxes on all property of the bank and followed it into the hands of the purchasers of its real estate and enforced the statutory lien thereon. Bear in mind, the lien thus enforced for the city's taxes on the bank's franchise was held to be on *all* the property of the bank, including the real estate of the bank which had been sold and conveyed to a purchaser at decretal sale. If this be true as to a city, *a fortiori* it must be true as to the State.

Wherever the State has a lien for taxes, it may, within five years, follow all property liable therefor into the hands of a

purchaser or transferee. (*Commonwealth vs. Walker, 25 Ky. Law Rep. 2122.*)

The court below, in passing on the question as to the day of assessment, or as of which all banks were required under the statutes in force during the years involved herein to make reports, construed said statutes, as applicable to the Bank of Kentucky and in harmony with its alleged contract with the State under the Hewitt Act, as follows (R. 55-56):

> "We will consider this question from two points of view. In the first place, the Revenue Act of 1892 was a valid act. The Bank of Kentucky only escaped the payment of taxes under its provisions by being fortunate enough to be placed in a position to invoke the doctrine of *res judicata*, which was the result of an erroneous opinion in holding that it had an irrevocable contract with the State under the Hewitt law.
>
> "Every substantial right which the bank acquired by reason of this adjudication under the Hewitt law must and should be respected. The act of 1892, which repealed the Hewitt law, provided that banks should make reports on or before the first day of March of each year, as of the date of the preceding 31st day of December. This part of the law fixed the time when the report should be made and the assessment of the property should take place. If the irrevocable contract claimed by the Bank of Kentucky did not operate to deprive the General Assembly of the right to fix the date when the report should be made and the property should be assessed, then the provisions of the act of 1892 with reference thereto are in force, and the bank should have made report on the 1st of March as of date of the preceding 31st of December. If this be true, then the Bank of Kentucky was the owner of the property at the date of assessment and liable for the taxes before it made the transfer to the National Bank of Kentucky. We are of opinion that the irrevocable contract established by appel-

lant did not operate so as to make inoperative the provisions of the act of 1892, with reference to the date of assessment of its property.

"The only right which it secured was to pay taxes upon the property as designated by the Hewitt Act. When the right to do this is maintained, every right it had under its irrevocable contract has been respected.

"If under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year, for which the assessment was made and the taxes were paid. The act does not say that the assessment shall take place on July 1st, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that day."

Furthermore, even in accordance with the original provisions of the Hewitt Act, the court below held that a lien existed upon the assets and property of the Bank of Kentucky as of September 15, 1899, for taxes due and payable to the State July 1, 1900, for the fiscal year ending June 30, 1900, as follows (R. 56):

"The Hewitt law provides that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for the taxes thereon. (Hewitt Law, Sec. 6, Art. 1, Gen. Stats., Ed. 1888, page 1035.)

"Under the Hewitt law, September 15th was assessment day. Under the section of the Hewitt law to which reference has just been made, the Bank of Kentucky became liable for taxes on the 15th of September of the fiscal year for which these taxes are claimed to be due, and under the law a lien existed upon the property to secure their payment, and when the National Bank of Kentucky received the property, it did so with a lien for

taxes upon it. The last views expressed are upon the assumption that the bank did not have to report on the 1st of March as of date of the preceding 31st of December. If the Revenue Act, in this respect, was not in force, then the provisions of the Hewitt law were, and as we have shown, by the terms of that law the property transferred to the National Bank of Kentucky was encumbered with a lien for the taxes in question."

This court will feel itself bound by the construction thus placed upon these statutes by the highest court of the State, especially as such construction does not impair the alleged contract between the Bank of Kentucky and the State in any material respect, either as to the amount of such tax or the time when the same is required to be paid to the State.

In the foregoing argument on this branch of the case, it has been assumed that the plaintiff in error, the Bank of Kentucky, had established an irrevocable contract with the State to pay taxes to it only in accordance with the provisions of the Hewitt Act. Such, however, is not the fact. The State was not a party to either of the three suits in the State court, the judgments in which were relied on as *res judicata* in the case of *Bank of Kentucky vs. Stone, supra,* in the Circuit Court of the United States for the District of Kentucky, nor was the State a party or privy to the latter suit, nor in any way bound by the final decree therein. Had the State chosen to do so, it could have, at any time thereafter, claimed and collected its taxes of said bank in accordance with the revenue act of 1892, instead of under the provisions of the Hewitt Act. The plea of *res judicata,* as against the State, has really no foundation, and the court below might have so held, in which event the State would have been entitled, as a matter of course, to collect its taxes of said bank in accordance with the revenue act of 1892 for the fiscal year ending June 30, 1900. (*Bank Tax Cases, 102 Ky. 174; Owensboro National Bank vs. Owensboro, 173 U. S. 636.*) Citizens Savings

III.

THE JUDGMENT OF THE COURT BELOW DOES NOT VIOLATE THE NATIONAL BANKING ACT.

The judgment sought to be reversed on this writ of error does not violate the National Banking Act by assessing the property of the National Bank of Kentucky, but the property assessed was omitted from assessment by the Bank of Kentucky, and the retrospective assessment is of the latter bank's property, which passed into the possession and under the control of the National Bank of Kentucky, while liable and under lien for the State taxes for the fiscal year ending June 30, 1900, and the National Bank of Kentucky can no more be heard to question the right of the State to enforce this lien or collect its taxes on such assessment than it could be heard to contest the validity of a lien in favor of a mortgagee on property which had otherwise passed into its possession or under its control from another bank. Once under lien for State taxes, the property of the Bank of Kentucky remains under lien until the same is discharged by payment. It would be an anomalous doctrine that a national bank could not be required to pay the taxes to the State or county on property under lien therefor at the time such national bank acquired ownership, possession or control thereof. If such be a correct doctrine, then all that an individual or a bank need to do in order to avoid the payment of a lien debt, either by mortgage or for taxes, would be to transfer his or its property to a national bank. The congressional act doesn't mean anything of that kind. If a national bank takes property from an individual or another bank already under lien for taxes, it must discharge that liability or lien before it can claim protection under the provisions of the National Banking Act, which prohibits the State from taxing the *property* of a national bank, or collecting taxes otherwise than upon the *shares of stock* in such bank. The assignment of error on that ground is, therefore, unavailing.

According to a well settled principle of corporation law, the Bank of Kentucky, as already observed, after its charter had been repealed, was still in existence for certain purposes; for instance, for the payment of its liabilities, and could have been sued thereon as it has been in this proceeding, service of summons being had upon its last chief officer; and therefore said bank could and ought to have made its report on March 1, 1900, as of December 31, 1899, to the auditor and paid its taxes in controversy on July 1, 1900. Either the old bank or the new bank should have discharged this liability and duty to the State.

"Such conversion (of a State bank into a national bank) is a *transition* rather than a new creation. All of the old bank's rights of action are preserved, and all of its liabilities still exist. Consequently, the new bank can sue to recover loans, and is *liable* for debts and *other obligations* contracted by its predecessor." *Cyc. of Law and Procedure, Vol. 5, p. 574, paragraph b, Note 34, citing numerous authorities, both State and Federal.*)

This court, in *Metropolitan National Bank vs. Claggett, 141 U. S. 527,* in holding that the conversion of a State bank in New York into a national bank, under an act of the Legislature of that State, did not destroy its identity or its corporate existence, nor discharge it as a national bank from its liability to holders of its outstanding circulation, issued in accordance with State laws, said:

> "The question we are to consider here is, did the court err in holding that the plaintiff in error was not exonerated from liabilities either by its becoming a national bank or by the proceedings for the redemption and retirement of its circulating bills issued whilst a State bank, which proceedings, it was claimed, were in strict observance of every requirement of the New York Statute of 1859 in relation thereto, or by the statute of limitations of the State of New York? The court decided that the New York statute providing for a redemption of circu-

lating notes and for releasing the bank, if the notes were not presented in six years, applied alone to banks 'closing the business of banking'; that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not 'close its business of banking' nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly; and that, therefore, the statutory proceedings relied upon in the answer could not operate as a bar to the liability of either bank to pay the bills delivered by the Metropolitan Bank in 1861 to plaintiffs' intestate.

"This decision is so manifestly correct that it needs no argument to sustain it. The judgment is, therefore, affirmed."

So, in *Michigan Insurance Bank vs. Eldred, 143 U. S. 293,* this court held that the conversion of a State bank into a national bank, with a change of name, under the National Banking Act, does not affect its identity, or its right to sue upon liabilities incurred to it by its former name.

If, after being nationalized, it may sue in its former name upon liabilities to it, then the converse must be true that it may be sued in its former name upon liabilities to others, including the State for taxes.

Upon these grounds and the authorities cited, it is respectfully submitted that the court below did not err in respect to the State taxes involved herein, and, upon the whole case, its judgment should be affirmed.

HENRY LANE STONE,
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SAMUEL B. KIRBY,
Of Counsel.

AUTHORITIES CITED.

I.

TAXES DUE THE COUNTY OF JEFFERSON—PLEA OF RES JUDICATA.

Section 4241, Kentucky Statutes (Carroll's Compilation, 1903).

Bank of Kentucky, et al. vs. Commonwealth of Kentucky, 29 Ky. Law Rep. 643.

Bank of Kentucky vs. Stone, et al., 88 Fed. 383, 386, 388.

Stone, Auditor, etc. vs. Bank of Kentucky and City of Louisville vs. Same, 174 U. S. 799.

Section 51, Civil Code of Kentucky.

Northern Bank vs. Stone, et al., 88 Fed. 413, 418, 419.

Farmers' Bank of Kentucky vs. Stone, et al., 88 Fed. 987.

Same vs. Same, 174 U. S. 409.

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Same vs. Same, 88 Fed. 986; 174 U. S. 800.

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Stone, Auditor, et al. vs. City of Louisville, 22 Ky. Law Rep. 423.

Equity Rule 48; Section 25, Civil Code of Kentucky.

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Hale vs. Finch, 104 U. S. 265.

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II.

STATE TAX.—PROVISIONS OF THE HEWITT ACT.

Board of Councilmen of Frankfort v. Mason & Foard Co., 100 Ky. 54.

General Statutes of Kentucky, Edition of 1888, pp. 1040, 1041.

Section 169, Kentucky Constitution.

Sections 4019, 4021, 4023, 4052, and 4092, Kentucky Statutes.

Section 2, Article 1, Hewitt Act, General Statutes of Kentucky, Edition of 1888, p. 1035.

Section 6, Article 1, Hewitt Act, Ib. p. 1035

Section 7, Article 2, Ib. p. 1041.

Section 7, Article 12, Hewitt Act, Ib. p. 1089.

Act approved April 24, 1882, General Statutes of Kentucky, Edition of 1888, p. 652.

Article 6 of Hewitt Act, pp. 1053-62, Sections 1 to 13.

Ib. Section 9, Article 9, p. 1075.

Section 5, Article 2 of Hewitt Act, Ib. p. 1041.

City of Middlesboro v. Coal & Iron Bank, 108 Ky. 680.

Commonwealth v. Walker, 25 Ky. Law Rep. 2122.

Bank Tax Cases, 102 Ky. 174.

~~Owensboro National~~ Bank v. Owensboro, 173 U. S. 664.

Citizens Savings

III.

THE JUDGMENT OF THE COURT BELOW DOES NOT VIOLATE THE NATIONAL BANKING ACT.

Cyc. of Law and Procedure, Vol. 5, p. 574, par. b, note 34 (citing numerous authorities, both State and Federal).

Metropolitan National Bank v. Claggett, 141 U. S. 527.

Michigan Insurance Bank v. Eldred, 143 U. S. 293.

APPENDIX.

Court of Appeals of Kentucky.

BANK OF KENTUCKY, ET AL., - - - - - - *Appellants,*

vs.

COMMONWEALTH OF KENTUCKY, BY ETC., - - - *Appellee.*

(Filed June 12, 1906.—29 Ky. Law Rep. 643.)

1. BANKS AND BANKING.—TAXATION.—TRANSFER OF BANK OF KENTUCKY.—Appellant insists in this action against it for taxes for certain years, that as its property should have been assessed as of date July 1 of each year, as it ceased to exist on May 1, 1900, and transferred its property to the National Bank of Kentucky, it is not liable for taxes that year to Jefferson County. (Deposit Bank of Owensboro v. City of Owensboro, 102 Ky., 174.)

2. SAME.—There was a lien upon the property transferred to the National Bank of Kentucky, and it must pay taxes if the Bank of Kentucky is liable for them, and the latter did not quit business until May 1, and was in existence December 31 prior thereto, the date at which the assessment upon its property was required to be made.

3. SAME.—CONSTRUCTION OF CONTRACT.—The contract established by appellant upon which it relies did not render inoperative the provisions of the act of 1892 with reference to the date of the assessment of its property. The only right which it secured was to pay taxes upon the property as designated by the Hewitt act. When the right to this is maintained, every right it had under its irrevocable contract has been respected.

Humphrey, Hines & Humphrey, for appellants.

H. L. Stone, S. B. Kirby, and R. W. Bingham, for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

The question involved in this case is the property formerly owned by the Bank of Kentucky, and transferred to the National Bank of Kentucky, liable for taxes to Jefferson County for the years 1898-9 and 1899-1900, and for State taxes for the year 1899-1900. The Bank of Kentucky was a corporation organized under the laws of this State, and prior to 1899 was

engaged in the banking business in the city of Louisville with a branch in the city of Frankfort. It was chartered long before what is commonly known in this State as the Hewitt Act of 1886 became a law. It accepted the provisions of the Hewitt Act, and paid its taxes under it, except for the years here in question. The charter of the bank was subject to amendment or repeal, so adjudged by this court and the Federal Court. It was the purpose of the present Constitution to establish a uniform system of taxation in the State. Under the Hewitt Act, the bank was not required to pay either county or municipal taxes. The amount which it paid the State was in lieu of all taxes. Under the Constitution, the Hewitt Act could not continue in force. So, to meet the new condition of things, the General Assembly of Kentucky in 1892 passed a law providing for taxation of banks as contemplated by the Constitution. However, the question arose as to whether the banks, and among which the Bank of Kentucky, had an irrevocable contract under the Hewitt law, and this court in what is known as the *Bank Tax Cases, 97 Ky. 590*, adjudged that the banks had an irrevocable contract under the Hewitt law, and could only be required to pay taxes under its provisions. There were other cases pending in the courts at the time of this decision, and this court, in *Deposit Bank of Owensboro vs. City of Owensboro, 102 Ky. 174*, overruled the previous opinion, holding that banks situated like the Bank of Kentucky did not have an irrevocable contract, and further held that they were required to pay taxes under the present Constitution and the revenue law of 1892. This last opinion created some apprehension in the minds of the officials of the Bank of Kentucky, and it filed its bill in the Federal Court, in which it pleaded the previous adjudication in the State courts, wherein its alleged contract with the Commonwealth had been established, and obtained an injunction against the city of Louisville, the city of Frankfort, and the county of Franklin and the several State officers, constituting the State Board of Valuation and Assessment. The Federal Court held that the judgment in the *Bank Tax Cases, 97 Ky. 590*, established the bank's claim to a contract with the State (*Bank of Kentucky vs. Stone, etc., 88 Fed. 383.*)

The legislature of Kentucky saw the inequality and the lack of uniformity in the assessment and payment of taxes resulting from the decision of the court, and concluded that the Bank of Kentucky should not continue to do business and only pay taxes under the Hewitt law, when its competitors in business were paying under the Revenue law of 1892, which required them to pay municipal and county taxes from

which the Bank of Kentucky was entirely free, except as hereinafter adjudged. The Federal Court adjudged that the Bank of Kentucky did not have an irrevocable contract with the State, giving it exemption from the payment of county and municipal taxes, but held that the question was *res judicata*, and, therefore, had the lawful right to refuse to pay taxes to the counties and municipalities which were parties to the action, wherein it was held it had an irrevocable contract under the Hewitt law. In view of these decisions, and in order to correct the manifest injustice that had resulted from the erroneous opinion holding that the bank had an irrevocable contract under the Hewitt law, the Legislature passed an act approved March 22, 1900, which reads as follows:

> "WHEREAS, By virtue of a recent decision of the Supreme Court of the United tSates, all banks of this State, both State and National, are now required to pay State and local taxes in Kentucky, except the Bank of Kentucky, the Farmers Bank of Kentucky, and the Deposit Bank of Frankfort, which three last named banks, by virtue of said decision, are now claiming exemption from all State and local taxes, except as provided in the Hewitt law, during their corporate existence, therefore:
>
> "Be it enacted by the General Assembly of the Commonwealth of Kentucky:
>
> "1. That an act, entitled, 'An Act to Establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof; also, an act entitled, 'An Act to Incorporate the Farmers' Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof; also an act entitled, 'An Act to Incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are, hereby repealed. *Provided,* That if said banks, or either of them, on or before May first, nineteen hundred, file in the secretary of State's office their or its written consent to pay taxes under State and local levies of nineteen hundred and subsequent years, as provided in the Constitution and Revenue statutes of this State, the bank or banks thus agreeing, shall be excepted from the operation of this act."

Under what is known as the Act of 1856, the Legislature had the right to repeal the charter of the Bank of Kentucky,

although it was powerless, while it permitted it to do business, to require it to pay taxes, except under the provisions of the Hewitt law, and the Bank of Kentucky recognized that the right to repeal its charter existed. Those interested in that bank organized the National Bank of Kentucky, and on May 1, 1900, transferred its assets to the latter bank. The county of Jefferson was not a party to the proceeding in the State Court wherein it was adjudged that the Bank of Kentucky had an irrevocable contract under the Hewitt law. It was not a party to the proceeding in the Federal Court wherein it was adjudged by reason of the adjudication in the State Court the bank had an irrevocable contract. As the Bank of Kentucky had not paid its taxes for the years stated, either to the State, or the county of Jefferson, under the Hewitt law, or otherwise, this proceeding was instituted for the purpose of having the property assessed and taxed for the benefit of Jefferson County and for the State for the years stated.

The claim of the bank is, that as the State Board of Valuation and Assessment was enjoined from assessing it for the taxes in the proceeding of the *Bank of Kentucky vs. Stone*, that the county of Jefferson is bound by that decision, and, therefore, not entitled to require the bank to pay the taxes, sought to be recovered. It claims that under the Hewitt law its property should have been assessed as of the date of July 1 of each year, and that as it ceased to exist on May 1, 1900, and transferred its property to the National Bank of Kentucky, it is not liable to pay taxes for that year.

As we have said, this court had decided in 102 Ky. that institutions similar to that of the Bank of Kentucky were required to pay municipal and county taxes as well as State taxes. Under that opinion it would follow that the Bank of Kentucky should have paid taxes to the county of Jefferson. Under the opinion in the Federal Court the same conclusion is reached, because that court held that where a municipality was not a party to the proceedings, it was not bound under the doctrine of *res judicata*. In discussing this question in the Northern Bank case, that court said:

> "The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal

and agent, as that relation is usually understood in the law. The State may, through its legislative branch, confer upon, and withdraw from the counties and cities power of taxation. But, when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by agent for a principal; it is by a quasi independent government, for the benefit of the people within its limits. The Legislature, if not restrained by the Constitution, may, by contract with individuals, limit its power either to levy taxes itself, or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof, either by the State or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is contending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are to be spent not for the State at large, but for the convenience and benefit of the people within its limits."

We think the reasoning of the court is conclusive of this question. It follows from this that it was the duty of the Bank of Kentucky to pay the county of Jefferson its taxes for the years in question. But it is urged that it is not entitled to these taxes because the State Board of Valuation and Assessment, whose duty it was to assess the property, was a party to the proceeding in the case of *Bank of Kentucky vs. Stone,* and, therefore, the county of Jefferson is bound by that judgment. This court in the case of *County of Henderson vs. Henderson Bridge Co., 25 Ky. Law Rep. 421,* had under consideration substantially the same question as here involved. In that case the court said:

"A person or municipality is not bound by former litigation, unless it was a party, either actually or by its representative. Under our statute, the Fiscal Court has control of the affairs of the county, and the sheriff is only a tax collector, in nowise a representative of the county in the management of its affairs, and the county is not, therefore, bound by any adjudication to which it was not a party. * * * Thus it is the duty of the assessor to assess the taxpayers. But it would not be maintained that a default judgment suffered by an assessor, enjoining him from assessing the property of a taxpayer, would bar the State or municipality from proceeding under Section 4241, Kentucky Statutes, to have omitted property assessed."

In that case the court held that the judgment against a sheriff or one against an assessor enjoining him from assessing property did not bind the county, but the Fiscal Court had control of the county affairs. The board of assessment and valuation did not have control of the fiscal affairs of Jefferson County, and in our opinion the judgment did not bind Jefferson County. It was the duty of the Bank of Kentucky to pay its taxes to Jefferson County, and these taxes were to be paid, not under the Hewitt law, because that denied Jefferson County to collect taxes from the Bank of Kentucky for county purposes, but under the Constitution and the Revenue law enacted pursuant to it, as held by the opinion of this court in 102 Ky. and the Federal Court in 88 Federal R., *supra*. Under the Revenue law of 1892, the banks were required to make their reports on or before the 1st day of March of each year, as of the 31st of December preceding. (Section 4092, Kentucky Statutes.) It will be seen that it was the duty of the Bank of Kentucky to make its report on or before the first day of March of each year as of the preceding 31st day of December for purposes of taxation for the benefit of Jefferson County. This must be true, because the Revenue Act of 1892 was in full force and operation in so far as the county of Jefferson and the Bank of Kentucky were concerned. It was in existence and conducting its business on the 31st day of December and also on the 1st of March, because it did not quit business until May first. Therefore, it is perfectly manifest that the proceeding should be sustained so far as Jefferson County is concerned, and the bank should be required to pay the taxes in controversy.

The case presents a more difficult question in the claim which the State asserts against the Bank of Kentucky (and as against the National Bank of Kentucky, as the holder of the property which is claimed to be liable for taxation). However, there is no difficulty in reaching the conclusion that if the Bank of Kentucky is liable for the taxes, there was a lien therefor upon the property transferred to the National Bank of Kentucky, and it must pay the taxes if the Bank of Kentucky is liable for them. (*Board of Councilmen of Frankfort vs. Mason & Foard Co., 100 Ky. 54.*)

It is insisted that under the Hewitt law, banks were required to report and pay taxes on the 1st of July in each year, therefore the assessment and the act of payment of the taxes occurred at the same time. The claim is then made that as the assessment did not take place until the first day of July, the Bank of Kentucky did not have any property to be assessed and was not required to report, as it had transferred its property to the National Bank. This argument

is based upon the claim that when the law provides that the assessment shall be made upon a certain day, the liability for taxes is fixed as of that date, and the person who owns or possesses the property at that time is bound for the taxes, although he may subsequently part with the property. In support of that contention, the case of the *Commonwealth vs. Riley's Curators, 25 Ky. Law Rep. 2006,* is cited. In that case this court approves the case of *Baldwin vs. Shine, 84 Ky. 507,* quoting from it as follows:

> "The assessment is made as of a certain day of each year. The liability is fixed as of that day, and the owner or possessor of the property upon that day is bound for the taxes, although he may subsequently part with it."

We will consider this question from two points of view. In the first place, the Revenue Act of 1892 was a valid act. The Bank of Kentucky only escaped the payment of taxes under its provisions by being fortunate enough to be placed in a position to invoke the doctrine of *res judicata,* which was the result of an erroneous opinion in holding that it had an irrevocable contract with the State under the Hewitt law. Every substantial right which the bank acquired by reason of this adjudication under the Hewitt law must and should be respected. The act of 1892, which repealed the Hewitt law, provided that banks should make reports on or before the 1st day of March of each year as of the date of the preceding 31st day of December. This part of the law fixed the time when the report should be made and the assessment of the property should take place. If the irrevocable contract claimed by the Bank of Kentucky did not operate to deprive the General Assembly of the right to fix the date when the report should be made and the property should be assessed, then the provisions of the act of 1892 with reference thereto are in force, and the bank should have made report on the 1st of March as of date of the preceding 31st of December. If this be true, then the Bank of Kentucky was the owner of the property at the date of assessment, and liable for the taxes before it made the transfer to the National Bank of Kentucky. We are of opinion that the irrevocable contract established by appellant did not operate so as to make inoperative the provisions of the act of 1892 with reference to the date of assessment of its property. The only right which it secured was to pay taxes upon the property as designated by the Hewitt Act. When the right to do this is maintained, every right it had under its irrevocable contract has been respected.

Second, if, under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year, for which the assessment was made and the taxes were paid. The act does not say that the assessment shall take place on July 1, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that day. The Hewitt law provides that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for the taxes thereon. (Hewitt Law, Section 6, Article 1, General Statutes, Edition 1888, page 1035.) Under the Hewitt law September 15th was assessment day. Under the section of the Hewitt law to which reference has just been made, the Bank of Kentucky became liable for taxes on the 15th of September of the fiscal year for which these taxes are claimed to be due, and under the law a lien existed upon the property to secure their payment, and when the National Bank of Kentucky received the property, it did so with a lien for taxes upon it. The last views expressed are upon the assumption that the bank did not have to report on the first of March as of date of the preceding 31st of December. If the Revenue Act in this respect was not in force, then the provisions of the Hewitt law were, and, as we have shown, by the terms of that law the property transferred to the National Bank of Kentucky was encumbered with a lien for the taxes in question.

The judgment is affirmed.

BANK OF KENTUCKY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 87. Argued October 23, 1907.—Decided December 2, 1907.

A municipal corporation is not necessarily bound by the decree in a suit against another municipality because officers of the State were parties thereto.

The relation of the state board of valuation to the counties and other municipalities is a matter of state regulation.

In Kentucky, neither a sheriff, nor assessor, nor the board of valuation has control of the fiscal affairs of the county and a judgment against them does not bind the county.

A judgment against a county of Kentucky and the members of the state board of valuation restraining the collection of taxes of that county as impairing the obligation of a contract created by a law of the State and within the protection of the Federal Constitution is not, because such state officers were parties, *res judicata* as to the validity of taxes imposed by another county, nor is such other county privy to the judgment.

It is competent for the legislature of a State to change the day that a bank shall report its property for assessment and to provide that the lien of the assessment shall follow the property in the hands of a vendee.

94 S. W. Rep. 620, affirmed.

THE facts, which involve the liability of certain banks in Kentucky to be assessed for back taxes under the revenue law of the State of Kentucky, are stated in the opinion.

Mr. Alexander P. Humphrey for plaintiffs in error:

This court has finally determined, in a case of similar import, that the thing established by the Federal decree was the binding and conclusive character of the contract embodied in the Hewitt law and its acceptance. *Deposit Bank* v. *Frankfort*, 191 U. S. 499 (514). See also dissenting opinion in same case.

This court has therefore decided the proposition that under the Hewitt law the Bank of Kentucky had a valid and binding contract which the Commonwealth of Kentucky could not alter or change, and that by the terms of that contract the property

of the Bank of Kentucky and its shares of stock could not, during its corporate existence, be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than is prescribed in said act, and could be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business.

It is further expressly decided that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they were intended to provide or did provide any assessment for taxation of the property of the Bank of Kentucky, its rights of property or franchise or shares of stock, except to the extent and in the manner provided by §§ 1, 2 and 3 of Article II of the Hewitt law, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of, and repugnant to, the Federal Constitution and void.

Property is always required to be assessed as of a certain date. *Commonwealth* v. *Riley's Curators*, 24 Ky. Law Rep. 2006; *Baldwin* v. *Shine*, 84 Kentucky, 507; *Wangler* v. *Black Hawk Co.*, 56 Iowa, 384; *S. C.*, 9 N. W. Rep. 314; *Coal Co.* v. *Porth*, 63 Wisconsin, 77; *S. C.*, 23 N. W. Rep. 105; *Southern Ins. Co.* v. *Board of Assessors*, 49 La. Ann. 401; *S. C.*, 21 So. Rep. 913.

A proceeding under § 4221 of the Kentucky Statutes is in plain contradiction of the decree of the Federal court and breaks down the contract which that decree establishes as having been made by the Bank of Kentucky.

The county of Jefferson was clearly bound by the decree of the Federal court, as privy thereto, and has no stronger case than the Bank of Kentucky.

There was no lien on the assets of the Bank of Kentucky when they were acquired by the National Bank of Kentucky.

Until assessment day it cannot be known what property exists subject to assessment, or against whom the assessment is to be made. There may be an inchoate lien after assessment day and before an actual assessment. But there can be no

inchoate lien prior to assessment day. If the day of assessment had arrived then it was the duty of the Bank of Kentucky to report its property subject to assessment and pay the taxes. If the day of assessment had not arrived, it was not the duty of the Bank of Kentucky to report or pay, and there could be no lien for taxes. The report to be made under the Hewitt law was to be made as of July 1. The condition of the bank then governed the assessment. What assets it had on the preceding 15th of September or December 31 was entirely immaterial.

The property owned by the taxpayer upon the assessment day must necessarily govern his assessment. If he parts with his property before assessment day, he cannot be liable for the taxes, nor can there be any lien for the taxes.

Mr. Henry Lane Stone, with whom *Mr. Samuel B. Kirby* was on the brief, for defendant in error:

The plea of *res judicata* as to the Jefferson county taxes is totally inapplicable, and the demurrer thereto, as well as to the whole answer of plaintiffs in error was properly sustained. § 4241, Kentucky Statutes (Carroll's Compilation, 1903); *Bank of Kentucky et al.* v. *Commonwealth of Kentucky*, 29 Ky. Law Rep. 643; *Bank of Kentucky* v. *Stone et al.*, 88 Fed. Rep. 383, 386; *Stone, Auditor &c.* v. *Bank of Kentucky* and *City of Louisville* v. *Same*, 174 U. S. 799; § 51, Civil Code of Kentucky; *Northern Bank* v. *Stone et al.*, 88 Fed. Rep. 413, 418; *Farmers' Bank of Kentucky* v. *Stone et al.*, 88 Fed. Rep. 987; aff'd 174 U. S. 409; *Joyes* v. *Jefferson County Fiscal Court*, 106 Kentucky, 615; *County of Henderson* v. *Henderson Bridge Co.*, 116 Kentucky, 164; *Deposit Bank of Frankfort* v. *Frankfort*, 88 Fed. Rep. 986; aff'd 174 U. S. 800; 191 U. S. 499; *Bank Tax Cases*, 97 Kentucky, 590; *Stone* v. *Louisville*, 22 Ky. Law Rep. 423; Equity Rule 48; § 25, Civil Code of Kentucky; *Apsden* v. *Nixon*, 4 How. 467; *Hale* v. *Finch*, 104 U. S. 265; *DuPasseur* v. *Rochereau*, 21 Wall. 130; *Metcalf* v. *Watertown*, 153 U. S. 671; *Hancock National Bank* v. *Farnum*, 167 U. S. 640.

The owner of property located within the State of Kentucky,

by a transfer thereof to another, cannot evade the taxes owing to the State thereon, it being at the time under lien therefor by the express letter of the statute. It is furthermore insisted that, on September 15, 1899, the property and assets of the Bank of Kentucky came under this statutory lien for the amount of taxes levied and fixed by law for state purposes. In other words, the National Bank of Kentucky took the property of the Bank of Kentucky *cum onore*, and this obligation to the State cannot be discharged until the taxes are actually paid for that year. On account of the failure or refusal to pay taxes for the year 1900, under the Hewitt act, the provisions of § 7 became enforcible, and the same rate of taxes must be paid to the State as on assessed taxable property in the hands of individuals, that is to say, under existing laws at the time of such failure or refusal and those laws were embodied in the General Revenue Act of November 11, 1892. *Frankfort* v. *Mason & Foard Co.*, 100 Kentucky, 54; General Statutes of Kentucky, ed. of 1888, pp. 1040, 1041 ; §169, Kentucky Constitution; §§ 4019, 4021, 4023, 4052 and 4092, Kentucky Statutes; Hewitt Act, General Statutes of Kentucky, ed. of 1888, p. 1035; Act approved April 24, 1882, General Statutes of Kentucky, ed. of 1888, p. 652; *Middlesboro* v. *Coal & Iron Bank*, 108 Kentucky, 680; *Commonwealth* v. *Walker*, 25 Ky. Law Rep. 2122; *Bank Tax Cases*, 102 Kentucky, 174; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.

The judgment of the court below does not violate the National Banking Act. 5 Cyc. of Law and Procedure, p. 574, par. b, note 34, citing numerous authorities, both state and Federal; *Metropolitan National Bank* v. *Claggett*, 141 U. S. 527; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the liability of plaintiffs in error, Bank of Kentucky and National Bank of Kentucky, to be assessed for certain back taxes under the revenue law of the State of

Kentucky. That law makes it the duty "of auditor's agents to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years." § 4241, Ky. Stats. (Carroll's Compilation, 1903).

In pursuance of other provisions of the section this suit was brought. There is no dispute about the facts. The Bank of Kentucky was chartered by the legislature of Kentucky in 1834. Its charter was subsequently twice extended, but was repealed by an act approved March 22, 1900. On that day the National Bank of Kentucky, was organized and took over its assets.

The purpose of the suit is to subject these assets to assessment for taxes for Jefferson county for the years 1898, 1899 and 1899–1900, and for the State for the year 1899–1900. Against the assessment for county taxes plaintiffs in error pleaded a judgment of the Circuit Court of the United States, which, it is contended, established that it had been adjudged that the Bank of Kentucky was only taxable under a law of the State, called the Hewitt law, and that such law constituted an inviolable contract between the bank and the State. And against the state taxes it was urged that the bank had ceased to exist by the repeal of its charter before liability under the Hewitt law attached.

1. By its original charter the Bank of Kentucky was required to pay twenty-five cents on each share of its stock in lieu of all other taxation. By an exercise of a power reserved the legislature increased this to fifty cents. By the Hewitt law it was provided that the banks in the Commonwealth should pay to the State seventy-five cents on each share of their capital stock outstanding, and the ordinary rate of state taxation on the amount of its profits less ten per cent thereof. The tax was to be in lieu of all local taxation, except upon the real estate occupied by the bank for the purpose of its business. It was provided that banks organized prior to its passage might accept

the terms of the law. If they failed to do so they were to be taxed as other corporations were taxed, and also should be subject to local taxation. The Bank of Kentucky accepted the terms and paid the taxes required. In 1891 Kentucky adopted a new constitution, which provided that all property of individuals and corporations should be taxed according to its value. In 1892, to enforce the provision of the constitution, the legislature passed a general revenue bill. Under the terms of the bill banks as well as other corporations are subject to taxation, and it is provided that their property at its fair cash value "shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same." Corporations are also required to pay a tax on their franchise to the State and to the locality where the franchise is exercised, to be levied by a board denominated the Board of Valuation and Assessment, constituted of the auditor, treasurer and secretary. It is the duty of the board to determine the apportionment of the tax where more than one jurisdiction is entitled to a share of the tax and fix the place of its payment. The auditor is chairman of the board, and it is made his duty at the expiration of thirty days after the final determination of such values to certify to the county clerks the amount liable for local tax, who in turn certifies it to the local tax officer.

The judgment relied on as *res judicata* was entered in a suit brought by the Bank of Kentucky in the Circuit Court of the United States for the district of Kentucky, wherein it impleaded Samuel H. Stone as the Auditor of Public Accounts of the State of Kentucky, Charles Fenley as the Secretary of State, and George W. Long as the Treasurer of State, the city of Louisville as a municipal corporation, the county of Franklin as a municipal corporation and the Board of Councilmen of the city of Frankfort as a municipal corporation.

The bill alleged the rights of the bank under the Hewitt law as a contract between it and the State, its exemption from taxa-

tion except under that law, and the invalidity as to it of the act of November 11, 1892. The bill also set forth various litigations which the bank had theretofore conducted, and in which, it insisted, it had been adjudged that it could not be taxed otherwise than under the Hewitt law. And it was alleged that the defendants would proceed to value the franchise of the bank in the manner set forth in the act of November 11 for the years 1895, 1896, and 1897, and certify such value to the clerk of Jefferson county, and that those assessments would be illegal.

The bill prayed that Stone, Fenley and Long be perpetually enjoined from assessing the value of the bank's capital stock under the act of November 11 for the years mentioned; that Stone be enjoined from certifying such valuation to the said several municipalities, and that such municipalities be enjoined and restrained from collecting any tax upon such valuation; that the bank's contract be fully established; that it be declared that, upon conforming to the same by making the payments under the Hewitt law or under its charter, no other or further taxes should be exacted from it under any form or by any authority. Issue was joined and the court decreed, among other things, as follows:

"It is further adjudged, ordered and decreed, by reason of the several pleas of *res judicata*, relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of Article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot during its corporate existence be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for

county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of Article II of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

It is insisted that this decree "decided that the Bank of Kentucky had a full and binding contract under the Hewitt law—a contract which the Commonwealth of Kentucky could not alter or change," and that by the terms of that contract its property was only subject to taxation under that law. It is further insisted that the extent of the decree is not limited by the reasons given for it, and *Deposit Bank* v. *Frankfort*, 191 U. S. 499, is cited.

The important consideration is, upon whom is the decree binding? Meeting the inquiry, the bank contends "that the county of Jefferson is clearly bound by this decree as privy thereto," notwithstanding it was not a party to the suit in which the decree was rendered, and deduces this from the dependence of the power of the county to collect taxes upon the assessment by the board of valuation of the value of the franchise of the bank and the certification of the proportion thereof that was subject to county taxation. It is hence further deduced that a judgment against the state board of valuation determines the rights of all the local communities claiming under a valuation and apportionment made by the board and the auditor.

The action of the Bank of Kentucky is inconsistent with this contention. In its litigation it made the local communities parties, and in the suit the decree in which is pleaded in

the case at bar as establishing its exemption from taxation, except under the Hewitt law, it secured an injunction against the Board of Valuation and Assessment by reason of a decree obtained against Franklin County in a suit to which the board was not a party. The court decided, and it was required to decide in order to give the bank the benefit of the decree, that the state board of valuation was the agent of the municipalities, county and city, and as a consequence that judgment rendered against the county of Franklin in the courts of the State, adjudging the Hewitt law a contract between the bank and the State, was binding upon the board of valuation. "Nor can there be any doubt," the court said, "that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, the city of Frankfort, and the city of Louisville. It is for them that the Board of Valuation and Assessment are about to apportion the estimated value of the franchise, and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by prior litigation, certainly the agents acting for them under the law are equally bound. In this light the Board of Valuation and Assessment is in respect to the former judgment privy to the city of Louisville and county of Franklin, and the city of Frankfort." *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383, 395. And on account of this agency and consequent privity with those municipalities the board of valuation was enjoined from action against the contract, determined to exist by the judgment set up and to which the board was not a party by name. The reason given for the decision is now opposed by plaintiffs in error and a decree obtained on account of it is asserted to be independent of it. The vicarious character of the board, as declared by the court, is attempted to be put out of view and a decree made against it because, and only because, it was the agent of certain municipalities is

sought to be made an instrument to bind all others without power of question or resistance on their part. This attempt is not justified by *Deposit Bank* v. *Frankfort*, and, as was said by the Circuit Court of Appeals in another case, "would be extending the doctrine of *res judicata* further than any authority will justify." *Northern Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 413, 415.

The Northern Bank of Kentucky had obtained a judgment against Bourbon County and its sheriff, adjudging that under the Hewitt law it had an irrevocable contract, and the bank sought to use the judgment as an estoppel against other counties and municipalities as well as against Bourbon County. It was sustained as to the latter but rejected as to the other municipalities. The argument was that Bourbon County was a municipal corporation under the state government, and that the State was bound by the litigation against it, and therefore every other municipality was bound. The court rejected the contention, making the remarks we have quoted. The relation of the board of valuation to the counties of the State was again decided to be that expressed in *Bank of Kentucky* v. *Stone*. The latter case was affirmed by this court by a division of its members. 174 U. S. 799.

There is another answer to the contention of plaintiffs in error. The relation of the board of valuation to the counties and other municipalities of the State is necessarily a matter of state regulation.

The Court of Appeals of Kentucky in the case at bar, answering the contention based on the effect of the judgment pleaded as *res judicata*, quoted, with approval, the views expressed by the Circuit Court of Appeals of the Sixth Circuit in the *Northern Bank case*, of the relation of the State to its counties and cities, and pronounced those views conclusive of "the duty of the Bank of Kentucky to pay its taxes for the years in question." And the court applied the doctrine of the case of *Henderson County* v. *Henderson Bridge Co.*, 116 Kentucky, 164, and declared that the question there considered was substantially the

same as involved in the case at bar. Quoting that doctrine, the court said: "A person or municipality is not bound by former litigation, unless it was a party, either actually or by its representative. Under our statute the fiscal court has control of the affairs of the county, and the sheriff is only a tax collector, in no wise a representative of the county in the management of its affairs, and the county is not therefore bound by any adjudication to which it was not a party." In other words, the court held that neither a sheriff nor an assessor had control of the affairs of the county, and a judgment against either did not bind the county. Applying this, the court further said "the board of assessment and valuation did not have control of the fiscal affairs of Jefferson County, and in our opinion the judgment did not bind Jefferson County."

2. To support the contention that there is no liability to the State for the tax of 1900, it is contended that the property of the Bank of Kentucky was only assessable under the Hewitt law, and before the property was required to be returned for assessment under that law the Bank of Kentucky had ceased to exist, and its property passed to the National Bank of Kentucky free from any lien.

A brief recapitulation of the facts will make the contention clear. Under the Hewitt law the stock and assets of banks were ascertained as of July 1, and the tax paid thereon. On May 1, 1900, as we have seen, by not accepting the conditions imposed upon it by the legislature, the charter of the Bank of Kentucky was repealed. On that day the National Bank of Kentucky was organized and the property of the Bank of Kentucky transferred to it. Under the general laws of the State all taxable property was required to be assessed and valued as of the fifteenth of September in the year listed, and the owner or possessor is required to list it with the assessor on that day, and remains bound for the taxes, notwithstanding he may have sold or parted with it. Section 4052. Under the act of 1892, which repealed the Hewitt law, banks were required to make reports on or before the first of March of each year as

of the preceding thirty-first of December. This provision fixed the time the property of banks should be assessed. The Court of Appeals held that this law was applicable to the Bank of Kentucky and fixed a lien on its property, which continued, notwithstanding the repeal of the charter of the bank and the transfer of the property to the National Bank of Kentucky. This result followed, the Court of Appeals further said, even viewing the Hewitt law as an irrevocable contract. In other words, it was decided that either one or the other of the two dates was the day of assessment and the commencement of the lien. That of December 31, if the Hewitt law should be regarded as repealed by the act of 1892, and the court decided that it was repealed. That of September 15, if the Hewitt law was not repealed, because the provision for the assessment of property as of the fifteenth of September was a part of the law. The court said (94 S. W. Rep. 623):

"If, under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year for which the assessment was made and the taxes were paid. The act does not say that the assessment shall take place on July 1, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that date. The Hewitt law provides that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the fifteenth of September of the year the assessment is made, shall be liable for the taxes thereon. Hewitt Law, sec. 6, Art. 1, c. 92, Gen. Stats., ed. 1888, p. 1035."

It was further decided that the only right which the bank secured was to pay taxes upon the property as designated by the Hewitt law. "When the right to do this is maintained," the court observed, "every right it [the Bank of Kentucky] had under its irrevocable charter has been respected."

The conclusions of the court are contested by plaintiffs in error, and it is insisted that the day of assessment was not

September 15 or December 31, but July 1, the day the bank was required to make its report, and that a lien for taxes could not attach until that day, and before that day the Bank of Kentucky had ceased to exist. But we have seen that the Court of Appeals of Kentucky, construing the laws of the State, made, the fifteenth of September the day of assessment under the Hewitt law; in other words, distinguished between the day of assessment and the day that bank was required to make its report. We are not prepared to say that the conclusion is not justified. But passing that, we concur with the Court of Appeals of Kentucky that it was competent for the legislature to change the day the bank should report its property for assessment, and that the lien of assessment would follow the property in the possession of its vendee, the National Bank of Kentucky.

Judgment affirmed.